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AND
THE INDIVIDUAL CONTRACT OF EMPLOYMENT

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CHAPTER 1

INTRODUCTION

A. PREFACE

In Manitoba, the rights and duties of employers and employees are determined either by individual contracts of employment or by collective agreements. In non-unionized (unorganized) workplaces, employees negotiate individual contracts of employment directly with their employer. The employment contract is subject to common law principles of contract law and any pertinent legislation. A breach of contract is remedied through the judicial process. In a unionized (organized) workplace, employer and employees are subject to a collective agreement negotiated between the union and the employer. The negotiation, performance and enforcement of collective agreements are controlled by specialized rules and procedures, a prominent feature of which is the grievance and arbitration remedial process. In *practice*, the employment relationships may operate similarly. In law, there is a significant divide. Indeed, it has been said that "the common law of employment, as a general rule, is no longer relevant to the determination of the rights and obligations of employees covered by collective agreements."[1] The subject of this Report is the individual contract of employment and the extent to which employers owe a duty of good faith to their employees.[2]

B. THE INDIVIDUAL EMPLOYMENT CONTRACT

An individual employment contract may be of two kinds. First, the contract may be for a *fixed term* such as a period of time or the completion of a task. Secondly, it may be for an *indefinite term*. A fixed term contract can only be terminated by the employer where the employee has broken the contract in a fundamental manner (a repudiatory breach) so as to give to the employer *cause*. In the context of employment, serious misconduct or incompetence amounts to cause.

Most individual employment contracts are for an indefinite or an indeterminate time. During that period, an employer may summarily terminate the contract without compensation if

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[1] H.W. Arthurs, D.D. Carter, J. Fudge, H.J. Glasbeek and G. Trudeau, *Labour Law and Industrial Relations in Canada* (4th ed., 1993) 319 referring to the Supreme Court of Canada decision in *McGavin Toastmaster Ltd v. Ainscough* (1975), 54 D.L.R. (3d) 1 (S.C.C.).

[2] *The Employment Standards Code*, C.C.S.M. c. E110, which provides minimum statutory protection to all employees, is not the subject of this Report.

the employee has provided *cause* for him or her to do so.[3] Additionally, either the employer or the employee may terminate an indefinite contract of employment *for any reason* so long as notice is given. The length of notice may be expressly designated in the contract, in which case the contractual term governs. Where the contract does not expressly or impliedly speak to the issue, there is an implied term in the contract that *reasonable* notice must be given.

A failure of an *employee* to give reasonable notice exposes him or her to liability for damages. The employer must, however, seek to mitigate his or her loss by hiring another worker. In times of labour surplus, this is a significant impediment to securing damages. Similarly, the failure of an *employer* to give reasonable notice to an employee of his or her dismissal exposes the employer to liability in damages.[4] The theory behind this requirement is that reasonable notice gives to the employee sufficient time to find alternative employment. In practice, few employers give notice before dismissal because they do not want the employee to continue to work for them during that period. The productivity of the employee is likely to drop and there is sometimes a risk that a disappointed employee will undermine the morale of co-workers or sabotage the employer's business operation. Most employers, therefore, dismiss without giving notice and subsequently negotiate an appropriate compensation package to reflect the amount the employee would have earned during the period of reasonable notice (often referred to as "pay in lieu of notice"). The employee is, of course, under a duty to mitigate his or her loss by seeking another position. However, in times of labour surplus, mitigation plays a lesser role in the termination of employment relationships by employers.

The dismissal process may, however, be complicated by the failure of an employer to handle it in an honest, forthright and sensitive manner. On occasion, the dismissal may be made in a cruel and callous manner which may add significantly to the inevitable trauma and distress of losing one's job. This is commonly referred to as a *bad faith dismissal*.

During the last few decades, Canadian courts have struggled with the issue of bad faith dismissal and the appropriate legal response to such conduct. There is little debate that bad faith dismissal is unacceptable conduct. It is a form of gratuitous incivility which protects no legitimate interest of the employer and compounds the suffering of the dismissed employee at a particularly vulnerable moment. The contentious point is how to fashion an appropriate remedy which can

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[3]The concept of *cause* in the context of an employee's dishonesty was discussed recently in the Supreme Court in *McKinley v. BC Tel* (2001), 200 D.L.R. (4th) 385 at 404 (S.C.C.). Iaccobuci J., speaking for the whole Court, stated:

> ...I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

[4]An employee may also be treated as being wrongfully dismissed where the employer is in fundamental breach of its employment contract. This is known as *constructive dismissal*.

protect employees and deter bad faith conduct while at the same time protecting the legitimate interests of employers to change or downsize their workforce. Central in this debate is the Supreme Court decision in *Wallace* v. *United Grain Growers Ltd.*[5] In that case, the Court addressed the issue of bad faith dismissal and provided a limited remedy for victims of bad faith conduct.

C. OUTLINE OF REPORT

This report examines the remedies for wrongful dismissal[6] before the *Wallace* decision and alludes to the changing nature of the employment relationship. It describes the principles set out in *Wallace* in respect of bad faith dismissal and reviews the subsequent judicial interpretation and application of *Wallace*. Options for reform are then identified, followed by our recommendations for reform.

D. ACKNOWLEDGMENTS

The Commission wishes to thank Professor Philip H. Osborne of the Faculty of Law, University of Manitoba, for undertaking this project for us. As in the past, Prof. Osborne's knowledge and expertise has been invaluable in reaching our final conclusions. He was assisted on the project during the summer months of 2000 and 2001 by Bonnie Macdonald and Lindsay Gilroy, second year law students at the Faculty at the time.

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[5] *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

[6] As defined in Chapter 2.

CHAPTER 2

WRONGFUL DISMISSAL BEFORE *WALLACE*

A. THE LEGAL ENVIRONMENT

The dismissal of an employee without reasonable notice is a breach of an indefinite contract of individual employment and gives rise to an action for damages.[1] There are three distinct interests that might be addressed in an award of damages. It may be useful to summarize those interests before examining the law.[2]

First, there is compensation for the financial loss arising from summary dismissal without notice. The employee will seek to be placed in the position he or she would have been in if the contact had been performed. This is the standard measure of damages for breach of contract. If reasonable notice was given, the employee would, *in theory*, have been in paid employment until new work was found. If no notice is given, the employee will seek wages in lieu thereof and will, thereby, have financial support until a new job is found.

Secondly, the employee may suffer distress, anxiety, suffering and other non-pecuniary loss, such as loss of reputation, as a consequence of the termination. This loss may arise from the loss of the job (not illegal in itself) or the failure to give notice (unlikely) or because of the brutal and callous conduct by the employer at the time of dismissal (bad faith conduct). Thirdly the employer's conduct at the time of dismissal may be truly egregious and outrageous. In those circumstances, damages may be sought to punish the delinquent employer.

Until recently, the common law provided remedies in respect of the first interest only.

The modern law of wrongful dismissal begins with the House of Lords decision in *Addis* v. *Gramophone Co. Ltd.*[3] It established the rule that reasonable notice must be given to terminate an indefinite individual employment contract. The period of "reasonable notice ... represents the time that may reasonably be required to find replacement employment."[4] A failure to give notice exposes the employer to an action for damages calculated by determining the amount of money that the employee would have earned during the period of reasonable notice. This, in theory,

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[1]Re-instatement is not an available remedy at common law.

[2]This framework is adapted from a passage in Prof. J. Swan's case comment "Damages for Wrongful Dismissal: Lessons from *Wallace v. United Grain Growers Ltd* (1998), 6 C.L.E.L.J. 313 at 313.

[3]*Addis* v. *Gramophone Co Ltd.*, [1909] A.C. 488 (H.L.).

[4]*Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at 751-752, per McLachlin J. (as she then was).

allows the plaintiff to be placed in the same financial position that he or she would have been in if the contract had been performed and notice had been given. It was also established in *Addis* that the remedy of salary in lieu of notice was the *exclusive* contractual remedy. No compensatory or aggravated damages could be awarded for the loss of reputation or injured feelings of the employee arising from the dismissal whether caused by the lack of notice or by the manner of dismissal. Furthermore, no punitive damages were available to punish the employer. This conservative decision, which reflected the spirit of the times, was heavily influential in Canada and was approved by the Supreme Court as recently as in *Vorvis* v. *Insurance Corporation of British Columbia*,[5] just over a decade ago. In that case, the Court made it clear that any remedy for loss of reputation, mental distress or suffering flowing from the lack of notice or bad faith conduct by the employer and/or punitive damages depended upon establishing an *independent* actionable wrong such as an action in defamation or for the intentional infliction of nervous shock.[6]

During the course of the twentieth century, however, legislatures and courts began to modify and ameliorate the principles contained in *Addis*.

The legislatures imposed minimum notice periods for termination. In Manitoba, those provisions are found in *The Employment Standards Code*.[7] Under section 61, for example, the general rule is that the employer must give notice of not less than one pay period or salary in lieu thereof. This rule is subject to a number of exceptions.[8] These notice provisions do *not*, however, displace the more generous common law entitlement to reasonable notice. One advantage of the legislative provisions is that the salary in lieu of notice must be paid even where the employee finds work immediately. Another advantage is that they cannot be excluded by express agreement of the parties.

During the course of the twentieth century, the courts continued to develop and refine the common law concept of reasonable notice in the Canadian context. The most commonly cited passage containing the pertinent factors in that inquiry is that of McRuer C.J.H.C. in *Bardal* v. *The Globe & Mail Ltd.*[9] He wrote:

> There can be no catalogue laid down as to what is reasonable notice in particular classes

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[5] *Vorvis* v. *Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085

[6] The concept of an independent actionable wrong has been discussed and refined recently by the Ontario Court of Appeal in the context of the breach of the insurer's duty of good faith to its insured in *Whiten* v. *Pilot Insurance Co* (1999), 170 D.L.R. (4th) 280; appeal to Supreme Court of Canada heard Dec. 14, 2000, decision reserved. The Court held that the independent wrong may be the breach of the duty of good faith as an obligation distinct from the obligation to pay on the occurrence of an insured loss. See also *McKinley* v. *BC Tel* (2001), 200 D.L.R. (4th) 385 at 404 (S.C.C.)

[7] *The Employment Standards Code*, C.C.S.M. c. E110, Part II, Division 10, Subdivision 1.

[8] *The Employment Standards Code*, C.C.S.M. c. E110, ss. 62-65.

[9] *Bardal* v. *The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145 (Ont. H.C.).

> of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

There is a multitude of cases interpreting this statement. A few observations are relevant to the task at hand. First, the general thrust of this passage is that the notice period is to provide time and financial support to find another job. Secondly, this is not an exhaustive list of factors that a court may take into account. For example, consideration has been given to an employer's inducements to leave previously secure employment and assurances of job security.[10] Prior to *Wallace*, however, the employee's mental suffering and the nature of the employer's conduct were not recognized as relevant in determining the period of reasonable notice. Thirdly, the *maximum* notice period gradually lengthened in the course of the twentieth century. In the absence of exceptional circumstances, it is now 24 months. Fourthly, the concept of reasonable notice gives the court a great deal of discretion to determine the quantum of compensation.

Dissatisfaction with the restrictiveness of the conventional remedy for wrongful dismissal began to increase in Canada in the latter part of the twentieth century. Particular concern was expressed for situations where the lack of notice (not the loss of the job) or bad faith conduct in the dismissal process created serious mental distress. The courts explored a number of ways to evade the conventional restraints and to fashion a remedy for the plaintiff's *non-pecuniary* loss. A number of strands of authority were discernable.

1. Compensation in lieu of notice was sometimes coupled with an award of *aggravated damages*[11] to recognize the injured feelings of the employee.[12]

2. Compensation for mental distress was occasionally awarded on the basis of a breach of the contractual obligation to give notice of termination.[13]

3. Compensation was payable for other independent actionable wrongs such as the intentional infliction of nervous shock, defamation or fraud that the employer may have committed. This technique was expressly permitted by *Vorvis*.

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[10]See *Wallace*, *supra* n. 4, per Iacobucci J. at 738.

[11]"Aggravated damages" are awarded to compensate the plaintiff for the mental distress and humiliation caused by the defendant's conduct.

[12]R.B. Schai, "Aggravated Damages and the Employment Contract" (1991), 55 Sask. L. Rev. 345.

[13]See, *Bohemier* v. *Storwal International Inc.* (1982), 142 D.L.R. (3d) 8 (Ont. H.C.), appeal as to quantum of reasonable notice allowed, (1983), 4 D.L.R. (3d) 8 (Ont. C.A.); leave to appeal to Supreme Court of Canada refused, [1984] 1 S.C.R. xiii.

4. In limited circumstances, *punitive damages* [14] were awarded to condemn egregious behaviour on the part of employers.[15]

5. On occasion, judges exploited the vagaries of "reasonable notice" and gave a longer period of notice where there were aggravating circumstances.[16]

This was a very piecemeal and *ad hoc* development which began before the Supreme Court's decision in *Vorvis*,[17] and continued on with less vitality in its shadow.

Consequently, the litigation in *Wallace* took place in an evolutionary legal environment with attendant uncertainty and unpredictability. It provided the Supreme Court with the opportunity to speak directly to the issue of bad faith dismissal and the appropriate remedies for such conduct.

B. POLICY PERSPECTIVES

The evolving legal rules on wrongful dismissal reflect changes in societal attitudes and policies to employment in general and to the process of termination in particular. The issue of wrongful dismissal is, therefore, an aspect of a broader issue: the relationship of employer and employee and the responsibilities each owes to the other.

At the outset of the twentieth century, the employment relationship was considered to be an exchange transaction by means of which the employee sold his or her labour as he or she might sell any commodity. The employer owed few obligations to the employee and had great freedom to dismiss employees and thereby re-shape his or her workforce. That freedom was curtailed solely to provide reasonable notice, a concept that did not receive a generous interpretation. This was advantageous to employers. There was legal certainty and the predictability of notice periods minimized the risk of expensive and unpredictable litigation. There was little recognition or protection of the vulnerability of employees and very little attention was paid to their competing interests of security of employment, vocational satisfaction and freedom from harsh conduct. The

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[14] "Punitive damages" are designed to punish the defendant for conduct that is high-handed, malicious, vindictive or callous. Punitive damages are not generally available for breach of contract.

[15] See, *Pilato* v. *Hamilton Place Convention Centre Inc.* (1984), 7 D.L.R. (4th) 342.

[16] *Trask* v. *Terra Nova Motors Ltd.* (1995), 127 Nfld & P.E.I.R. 310 (Nfld. C.A). See also the list of cases referred to by Iacobucci, J. in *Wallace*, *supra* n. 4, at 743.

[17] See *Ribeiro* v. *Canadian Imperial Bank of Commerce* (1992), 13 O.R. (3d) 278 (C.A.), leave to appeal to Supreme Court of Canada refused [1993] 2 S.C.R. x; and *Francis* v. *Canadian Imperial Bank of Commerce* (1994), 120 D.L.R. (4th) 393 (Ont. C.A.) where punitive damages were awarded for a bad faith dismissal; and *Dixon* v. *British Columbia Transit* (1995) B.C.L.R. (3d) 108 (S.C.) where aggravated damages were awarded.

decision of the House of Lords in *Addis* reflected these societal and judicial attitudes.

The passage of the twentieth century witnessed a dramatic reassessment of the employment relationship and its place in society. There is now a more balanced view of it. There is greater sensitivity to and protection of the interests of employees. This is most apparent in the gains of organized labour. It is also reflected in a number of Supreme Court judgments in cases on employment issues.[18] The Supreme Court has spoken of these changing attitudes and has favoured policies that depart substantially from those which underlay *Addis*. The Court has spoken of the central importance of employment in Canada, of its contribution to the welfare of everyone, of the vulnerability of employees as a group in society, of the importance of employment to the employee's financial and social well-being and as a component of a person's identity, self worth and emotional health, of the fundamental impact that dismissal has on the financial and psychological welfare of employees and of the need for greater protection of the interests of employees. These are the policies which drive the gradual evolution of Canadian employment law away from *Addis* towards a more balanced approach to the competing interests of employees and employers.

Professor Etherington has reviewed a number of employment cases decided by the Supreme Court in the 1990s and his analysis confirms this socio-legal trend. He writes:

> [There] is a fairly consistent thread of judicial recognition of the importance of employment and the manner of termination of employment to the average employee's economic and personal well-being. At the same time, the Court has expressly acknowledged the relational nature of the employment contract and the inequality of bargaining power and vulnerability of the employee as factors that are almost endemic to the average employment relationship. More importantly, the Court has in several cases indicated the need to take these features of the employment relationship into account when developing the common law to govern the relationship and its termination.[19]

This swing in societal and judicial attitudes in favour of *employee rights* is, however, being met by a competing vision of the employment relationship. There is concern that greater protection of employee rights may reduce productivity, thereby leading to a lack of competitiveness which may impact adversely on the Canadian economy. It is argued that employers in a rapidly changing technological economy must be empowered to downsize or change the nature of their workforce with minimal legal obstacles. In this environment, rules protecting employees' rights may be unwelcome. Etherington has also commented on this point. He writes:

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[18]E.g. *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313; *Slaight Communications Inc* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1054 and 1057; *Machtinger* v. *HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 990 and 1002; *McKinley* v. *BC*, *supra* n. 6, at 405-406.

[19]B. Etherington, "Supreme Court of Canada Decisions and the Common Law of Employment in the 1990's: Shifting the Balance Between Rights and Efficiency Concerns?" (1999), 78 Can. Bar Rev. 200 at 217.

> Globalization of capital and industry, technological change, and new free trade arrangements have created significant pressures on employers, legislators and courts to adopt a new approach to regulation of the employment relationship. Government policy statements and mainstream media culture are rife with expressions of the *efficiency paradigm*. This paradigm gives preeminence to the values of the market and freedom of contract and insists that employment law should not interfere significantly with the operation of market forces to determine the terms and conditions of employment.... Adherents to the *efficiency paradigm* would not welcome judicial recognition of an implied obligation of fairness on the part of the employer because of the potential for increased uncertainty and cost in employer reorganization and downsizing decisions.[20] [emphasis added]

At the time that *Wallace* was decided there were, therefore, competing policy tensions and different visions of the employment relationship. Since the 1980s, the judiciary has, in the main, been influenced by the *employee rights* paradigm. The business world sees merit in the *efficiency paradigm* particularly in the twenty-first century economy. Efficiency concerns are best served by a strict interpretation and application of *Addis*.

The task of the Supreme Court in *Wallace* was to seek an appropriate balance between protecting employees from bad faith conduct without unduly limiting the freedom of employers to make legitimate and reasonable decisions in respect of re-shaping or down-sizing their workforce.

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[20] *Id.* at 201-202.

CHAPTER 3

THE *WALLACE* DECISION

The facts of *Wallace* present a classic case of bad faith dismissal. At the age of 45, Wallace, a very successful salesman in a secure job, was head-hunted by the defendant. The inducements to join the defendant included assurances of job security until retirement. He enjoyed considerable success with the defendant for fourteen years when, without warning, he was summarily fired. No reason was given to him. He was permitted to collect his personal belongings and was escorted from the building. The defendant alleged that they had cause for his dismissal. It was an unfounded allegation. Moreover, the defendant continued to play "hardball" with Wallace. It maintained until trial that there was cause for his firing. His chances of securing employment were destroyed. He suffered intense mental suffering and was ultimately diagnosed as suffering from clinical depression.

At trial, Lockwood J. held that 24 months notice was reasonable in the circumstances and, additionally awarded $15,000 for the mental distress that the defendant ought to have foreseen would result from a dismissal without cause or warning. The decision reflects a preference for the *employee rights* paradigm of the employment relationship.

The Manitoba Court of Appeal (*per* Scott C.J.) reduced the notice period to 15 months on the grounds that 24 months notice was too long. In the Court's view, the trial judge's use of the longer period indicated that he was influenced by the defendant's bad conduct. This factor was not to be taken into account in calculating reasonable notice. The claim for mental distress was disallowed on the basis of a narrow reading of *Vorvis*. The plaintiff had not established an independently actionable wrong. Foreseeability of distress was insufficient to establish such a wrong. The Court of Appeal was clearly influenced by *employer efficiency* concerns.

The Supreme Court gave leave to appeal and it took the opportunity to review the law of wrongful dismissal and the legal consequences of bad faith dismissal.

The majority of the Supreme Court, in a judgment delivered by Iacobucci J., affirmed the traditional approach to indefinite individual employment contracts and did not curtail the employer's right to dismiss for any reason so long as reasonable notice is given. The Court did, however, rule that the employer must exercise that power of dismissal in good faith. The Court recognized the vulnerability of employees, particularly at the time of dismissal, and the importance of employment to the economic, social and personal well-being of employees. It condemned the "behaviour of employers who subject employees to callous and insensitive treatment in their

dismissal...."[1] Furthermore, the concept of good faith and fair dealing in the dismissal process requires that the employer act in a "candid, reasonable, honest and forthright"[2] manner and should refrain from conduct which is "unfair, misleading and unduly insensitive."[3] The essence of the obligation is that employees should be treated reasonably and decently at the time of termination. The remedy for bad faith dismissal proposed by the Court was to extend the period of reasonable notice beyond that which would be required in the absence of bad faith conduct. In essence, bad faith conduct permits a court to increase the damages by some multiple of the employee's monthly salary. The extension of the notice period does not depend upon proof that the bad faith conduct impacted adversely on the employee's opportunities for alternative employment. The Court restored the trial judge's decision that the period of reasonable notice was 24 months.

A minority of the Court, in a judgment delivered by McLachlin J. (as she then was), agreed with the majority's conceptualization of the employment relationship and with its demand for good faith conduct in the termination process. It disagreed on the legal vehicle to achieve a remedy for bad faith dismissal. It preferred to identify an implied term of the employment contract that the employer act in good faith at the time of termination. The employee's claim must be based on a breach of that contractual obligation. The award of damages must be tailored directly to compensate the plaintiff's loss. The minority would have restored the 24 month notice period and would have upheld the trial judge's award of damages for mental distress for the bad faith conduct.

The decision of the Court may be seen as a compromise between employees' rights and employers' efficiency concerns. The majority spoke strongly of the need for good faith conduct but chose a relatively weak remedy. The Court preferred to leave more radical reforms to the legislatures.[4]

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[1] *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at 740.

[2] *Id*, at 743.

[3] *Wallace*, *supra* n. 1, at 743.

[4] *Wallace*, *supra* n. 1, at 735-736.

CHAPTER 4

THE *WALLACE* DECISION: THE AFTERMATH

The recognition in *Wallace* of the importance of employment in society and the need for good faith conduct of employers at the time of termination has been well received. There has, however, been some criticism of the remedial regime of extended notice. It is useful to review the criticism of the decision in *Wallace* and the limitations of the majority ruling before reviewing the jurisprudence that followed the decision.[1]

1. It has been suggested that the majority decision in *Wallace* is more pragmatic than principled. It lacks a coherent principle because the function of the obligation to give reasonable notice is to provide a period within which the employee may find alternative employment. An award of damages for bad faith dismissal, however, does not depend on whether or not the conduct makes it more difficult to find another job. In *Wallace*, the Court used the breach of a contractual obligation to give notice to protect an interest that it was not designed to protect. "Wrongs should give rise to a remedy. The problem with *Wallace* is that the remedy is divorced from the wrong."[2]

It is pragmatic because damages are calculated by adding multiples of the employee's monthly salary which will likely restrict the quantum of damages to levels which are not unduly burdensome to employers, thereby avoiding the risk of significant awards of aggravated and/or punitive damages.

2. The method of compensation for bad faith dismissal adopted in *Wallace* is likely to under-compensate some employees because it does not directly address the extent of their loss. Imagine, for example, that the period of reasonable notice for a dismissed employee, in the absence of bad faith conduct, is four months. That period of notice is extended by three months for a bad faith dismissal. Imagine further that the employee suffers severe emotional distress and is not fit for work for twelve months. The plaintiff's financial loss arising from five months loss of employment has not been addressed and no award has, in fact, been made for the employee's non-pecuniary loss. The plaintiff has been severely under-compensated. This situation arose in

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[1]Most of the points made below are found in the trenchant criticism of *Wallace* by Prof. L. Stuesser, "Wrongful Dismissal–Playing Hardball: *Wallace* v. *United Grain Growers*" (1998), 25 Man. L.J. 547.

[2]*Id.*, at 565.

Whiting v. *Winnipeg River Brokenhead Community Futures Development Corp.*[3] In that case, which was decided prior to *Wallace*, the trial court found that the plaintiff had been constructively dismissed and awarded damages of $80,242 which included six months salary in lieu of notice, non-pecuniary damages for mental distress and in damages for the loss of income from her inability to work after the notice period because of the mental distress. The Manitoba Court of Appeal (post-*Wallace*) overruled the awards for mental distress ($53,225) and, following *Wallace*, increased the notice period because of the bad faith conduct from six to twelve months for a total of $42,185.76 (of which $21,092.88 represented the "damages" for bad faith conduct). Professor Stuesser has drawn attention to this consequence.[4] He points out that the Court of Appeal in *Whiting* focused unduly on the employer's conduct and insufficiently on the consequences of that conduct. As a result, the plaintiff in *Whiting* is under-compensated.

3. The calculation of damages on the basis of the employee's monthly salary may produce injustice. The reasonable notice period is to provide a financial cushion between jobs and, thereby, maintain the employee's income flow at usual levels in the interim. The employee's monthly income is not, however, an appropriate benchmark to compensate bad faith dismissal because neither the plaintiff's loss nor the need for deterrence are related to his or her level of income. There is no rationale for giving more compensation to high earners and less to low earners where the employer's conduct and the employee's loss is the same, other than in the exceptional case where the bad faith dismissal makes it more difficult to find a job. Professor Stuesser uses the example of two employees who suffer the same wrong which justifies an additional period of notice of three months. The employee earning $2,000 a month receives a $6,000 award of damages and the employee earning $5,000 per month receives $15,000 as damages.[5] The remedy for bad faith dismissal departs from the conventional rule that damages are designed to compensate each plaintiff for the loss that he or she has suffered.

4. The decision creates a degree of added uncertainty and unpredictability in the law. First, not all judges will transparently identify the number of months to be added to the period of reasonable notice for the bad faith conduct. It may be commented on as a relevant factor in reaching a single period of notice. Secondly, courts may be influenced by the employee's salary in choosing the number of months to be added for bad faith conduct. The number of months added will not, therefore, always be an indicator of the court's assessment of the employer's conduct. Thirdly, difficulties are created when the bad faith conduct does impact adversely on the employee's ability to find another job. Is that factor to be counted twice: once in determining the period of reasonable notice and again in extending that period of notice to recognize the poor conduct?

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[3] *Whiting* v. *Winnipeg River Brokenhead Community Futures Development Corp* (1997), 116 Man. R. (2d) 89 (Q.B.), (1998), 159 D.L.R. (4th) 18 (C.A.).

[4] Stuesser, *supra* n. 1, at 563.

[5] Stuesser, *supra* n. 1, at 562.

5. The decision draws an unwarranted dichotomy between indeterminate employment contracts that may be terminated on reasonable notice (as was the case in *Wallace*) and employment contracts that contain express termination provisions. *Wallace* does not apply to the latter situation because there is no opportunity to award a lengthier period of reasonable notice. The obligation of good faith dismissal does not therefore apply to all employers and the decision encourages employers to negotiate express notice provisions to avoid the obligation of good faith set out in *Wallace*.[6]

[6]G. England, *Individual Employment Law* (2000) 71.

CHAPTER 5

JUDICIAL DECISION MAKING SINCE *WALLACE*

There has been a great deal of litigation in the area of bad faith dismissal since the *Wallace* decision. The cases where a judicial finding of bad faith conduct has been made are collected and summarized in Appendix A. A number of conclusions can be drawn from them.

1. The central and unanimous holding of the Supreme Court that employers owe a duty of good faith in the dismissal of employees has been given a broad and generous interpretation. This was anticipated because that obligation does not significantly impinge on the efficiency interests of employers. The decision sets a standard of conduct which is comfortably met by responsible employers. There is no justification for gratuitous, callous and brutal conduct.

2. The courts have had little difficulty with the concept of bad faith dismissal. Good faith has occasionally been criticized as an inexact standard that threatens to produce inconsistent and unpredictable results. The cases do not support that view.

3. Courts have not only been willing to review the conduct of the employers at the time of termination but also have taken a broad view of the situation and have considered conduct both immediately before and after the firing so long as it is broadly related to it. The following conduct has been regarded as evidence of bad faith in the process of dismissal:

- making unfounded allegations of cause such as poor performance or dishonesty;
- maintaining allegations of cause until the last moment before trial;
- abruptly and capriciously firing without explanation or reasons;
- using callous, cruel and insensitive language in termination;
- demanding that the employee immediately vacate his or her office;
- escorting the employee from the workplace when the interests of the employer are not threatened;
- dismissing an employee who was known to be in a vulnerable situation such as illness, grief or emotional fragility when the termination could be delayed without impinging on the legitimate business interests of the employer;
- dismissing the employee on his or her birthday, wedding day or child's graduation;
- circulating unfounded allegations and rumours about the employee in the market place;
- failing properly to evaluate the performance of the employee;
- making wrongful allegations of incompetence, insubordination, fraud and other improper conduct before and/or after termination;
- harassing the employee;
- refusing to provide a reference or supplying a misleading or inaccurate reference.

4. The quantum of compensation given for bad faith dismissal has been moderate.[1] There are very few cases where the *additional* notice period given for bad faith dismissal exceeds six months and the great majority of cases fall into the two to six month range.[2] The awards have been moderate with only a couple of awards exceeding $50,000. Most awards fall into the $5,000-$25,000 range. These awards are not significantly larger than those that were made by courts taking advantage of the ambiguities in the *Vorvis* decision before *Wallace* and, in some cases, they are well below those awards. What the Supreme Court in *Wallace* gave with the right hand, in terms of employee rights, it took back with the left hand in terms of the remedial scheme.

5. The inherent and unavoidable inequity of tying damages for bad faith dismissal to the employee's monthly salary is clear from the list of cases below all of which gave six months additional notice to compensate for the bad faith dismissal.

S.S. v. *Port Alberni Friendship Center* 2000 BCSC 106	$18,469.99
Whiting v. *Winnipeg River Brokenhead Community Futures Dev. Corp.* (1998), 159 D.L.R. (4th) 18 (Man. C.A.)	$21,092.88
Squires v. *Corner Brook Pulp and Paper Co.* (1999), 175 Nfld. & P.E.I.R. 202 (Nfld. C.A.)	$38,790.00
Simpson v. *Consumers Association of Canada* (1999), 41 C.C.E.L. (2d) 179 (Ont. Gen. Div.)	$49,093.00
Smart v. *McCall Pontiac Buick Ltd.* (7 Sept. 1999), Kamloops 22360 (B.C.S.C.)	$75,000.00

These cases suggest that the inequities that were inherent in the remedial scheme chosen in *Wallace* have come to pass. These are not, however, problems that the Supreme Court is likely to address again in the foreseeable future.[3] The majority of the Court clearly felt constrained from considering some legal solutions to the issue of bad faith dismissal on the grounds that they were better dealt with by the legislature.[4]

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[1] See Appendix B for a list of cases setting out the additional notice given for bad faith dismissal and the quantum of awards

[2] The courts continue to be reluctant to award more than 24 months notice whatever the circumstances.

[3] The Supreme Court applied *Wallace* in *McKinley* v. *BC Tel* (2001), 200 D.L.R. (4th) 385 (S.C.C.).

[4] *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at 735-736.

6. The Prince Edward Island Court of Appeal[5] has recently held that *Wallace* does not apply where the employment contract contains an express provision regarding termination. It applies only to indeterminate contracts of employment where reasonable notice is required for termination. It is only in those situations that the notice period may be lengthened to reflect bad faith conduct. There is no generalized implied contractual term of good faith dismissal.

There would appear to be little justification for imposing different standards of conduct in the dismissal process on the basis of the nature of the termination provisions. An express termination provision can be exercised in bad faith just as easily as the implied power. This dichotomy in employment law encourages employers to negotiate express termination provisions so as to escape the constraints of *Wallace*.

[5] *Barnard* v. *Testori Americas Corp.*, 2001 PESCAD 4.

CHAPTER 6

OPTIONS FOR REFORM

The options for reform fall into two categories. The first attempts to limit the power of employers to dismiss employees unless they have *good reasons* to do so. This is a much more significant reform than either the majority or minority of the Supreme Court in *Wallace* were willing to contemplate. This seeks to curtail the present power of employers to dismiss for any reason, so long as reasonable notice is given. It is very protective of employee rights. The remaining options focus on the nature of the employer's *conduct* in exercising the conventional power to dismiss. These options fall along a spectrum from those which are more protective of employees' rights to those that are more sympathetic to employers' efficiency concerns.

A. NO DISMISSAL WITHOUT CAUSE

This option restricts the right of employers to terminate the employment relationship for any reason so long as reasonable notice is given. It requires the employer to have a "good reason" to dismiss the employee. This position has been advanced by Professor Swinton.[1] She writes:

> ...many employees are still without adequate protection against discharge without cause. It can be argued that it is time for the Courts to take the necessary steps to provide such protection. This would require the courts to treat the employment contract of indefinite term as just that. Instead of reading in a term of "reasonable notice" for termination, they should be reading in an implied term of "termination only for just cause".

Conventionally, *just cause* is a repudiatory (fundamental) breach of the employment contract by the employee. It may be extended to require employers to justify any dismissal with good faith reasons. S.R. Ball has taken this position in his article "Bad Faith Discharge".[2] In the light of *Wallace*, the title to the article may be misleading. Ball does not merely call for good faith in the manner of dismissal; he argues that the power to dismiss be restricted to circumstances where the employer can establish good faith *reasons* to do so. In his view, dismissal "in bad faith and *not pursuant to a legitimate business need or interest*"[3] should not be permitted. This reform would "protect an employee's reasonable expectation of continued employment when job

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[1] K. Swinton, "Contract Law and the Employment Relationship: The Proper Forum for Reform" in B.J. Reiter and J. Swan (eds.), *Studies in Contract Law* (1980) 357 at 373.

[2] S.R. Ball, "Bad Faith Discharge" (1994), 39 McGill L.J. 568.

[3] *Id.*, at 573. [emphasis added]

performance is satisfactory."[4] The New Zealand Law Commission, in its Report on the *Aspects of Damages: Employment Contracts and the Rule in Addis v. Gramophone Co.*, took a similar position.[5] It recommended that an employee who has been dismissed without good reason should be compensated and that the compensation should include an amount for humiliation, loss of dignity and injury to feelings. "Good reason" was defined as:

> ...a reasonable basis for the dismissal having regard to the terms of the employment contract, the employee's conduct and the performance record, and the legitimate economic needs of the employer.[6]

There are a number of vehicles for such a change in the law. Swinton recognizes the power of judges to imply a term of the contract preventing such a bad faith dismissal but favours statutory intervention to permit a more deliberately crafted framework balancing employer and employee interests, defining "cause" and creating appropriate remedial procedures.[7] Ball recognizes the option of contractual liability but favours a tort of "bad faith discharge".[8] In the light of *Wallace*, both these options would now require a legislative initiative.

There are a number of reasons supporting this option. First, it would reduce the disparity between employees under indefinite contracts of individual employment and organized labour whose rights are defined by their collective agreement. Every collective agreement in Manitoba must have a provision that the employer has *just cause* for disciplining or dismissing an employee.[9]

Secondly, there are legislative initiatives in Canada requiring cause for dismissal in the context of an individual contract of employment. The *Canada Labour Code*[10] provides non-unionized employees in federally regulated workplaces with protection from dismissal without cause. The employee must have been in continuous employment for one year or more. The procedures and remedies for violation of these provisions (including reinstatement)[11] are found in

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[4]Ball, *supra* n. 2, at 598.

[5]New Zealand Law Commission, *Aspects of Damages: Employment Contracts and the Rule in Addis v. Gramophone Co.* (Report #18, 1991) 56-58.

[6]*Id.*, at 58.

[7]Swinton, *supra* n. 1, at 374-375.

[8]Ball, *supra* n. 2, at 593-597.

[9]*The Labour Relations Act*, C.C.S.M. c. L10, s.79(1).

[10]*Canada Labour Code*, R.S.C. 1985, c. L-2, Part III, Division XIV, ss. 240-246.

[11]An employee who alleges dismissal without cause may file a complaint with the Minister of Labour. The employer must prepare and deliver written reasons for the dismissal within 15 days of receiving the complaint. An inspector is appointed to investigate the complaint, mediate between the parties and if possible settle the matter. If there is no settlement an adjudicator is appointed (continued...)

the Code, the pertinent provisions of which are set out in Appendix C of this Report. In Nova Scotia, employees with ten years or more of continuous employment with the same employer may not be dismissed without cause.[12]

This option would move the law substantially towards the protection of employee rights, providing much greater security of employment and furthering the vocational, social and personal interests of employees. Careful consideration would need to be given to procedural and remedial issues. The *Canada Labour Code* provides a useful administrative model which avoids the delay and expense of the court process. It would be prudent to consult extensively with representatives of management and labour before initiating such a radical change in employment law. Some employers may resist such a change on the grounds of efficiency concerns. Organized labour may also resist such a reform, preferring to see job security as a benefit of unionization and collective bargaining rather than flowing from legislative intervention.

B. AN IMPLIED TERM IN THE EMPLOYMENT CONTRACT OF GOOD FAITH IN PERFORMANCE AND IN TERMINATION

This option does not seek to restrict the employer's traditional right to terminate for *any* reason. It provides for a general implied obligation of good faith conduct in both the *performance* and *termination* of the employment relationship. This option avoids one criticism of *Wallace*: that it focuses exclusively on the issue of termination and not on the whole relationship from start to finish. Try to imagine, for example, an employer who treats his employees callously and brutally but at the point of termination acts with good faith. *Wallace* provides no remedy. Alternatively, imagine an employer who is a model of appropriate behaviour over the full course of the employment relationship but terminates the contract brutally. *Wallace* provides a remedy. It is true that employees are particularly vulnerable at the point of termination but they are vulnerable throughout the relationship. Professor Swan, who supports a general duty of good faith conduct for employers, has remarked:

> The fact is that far more unhappiness is probably caused by the general failure of many employers (or, perhaps, more accurately, many managers) to behave decently during the employment relation than by brutal terminations.[13]

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[11](...continued)
The adjudicator determines if there was cause for the dismissal. Cause in this context means serious misconduct, the discontinuance of the employee's function or a lack of work. The adjudicator has a range of remedies available including reinstatement, damages and equitable relief. The remedies are discretionary. Reinstatement, for example, may be refused if the employment relationship is irreparably damaged or subsequent events make it impractical.

[12]*Labour Standards Code*, R.S.N.S. 1989, c. 246, s. 71(1).

[13]J. Swan, "Damages for Wrongful Dismissal: Lessons from *Wallace v. United Grain Growers*" (1998), 6 C.L.E.L.J. 313 at 327; see also *The Human Rights Code*, C.C.S.M. H175, s. 19.

Swan has argued for the "need to impose a general duty of good faith conduct on employers throughout the employment relation."[14] The content of such a duty would be an obligation to act decently towards employees and refrain from harassing, abusive or humiliating conduct.

This option may be supported on a number of grounds. First, the law of *constructive dismissal* has developed to a point that suggests an obligation of good faith performance. Constructive dismissal arises when the conduct of the employer amounts to a repudiatory (fundamental) breach of the employment contract. For example, where the employer makes a unilateral change in a fundamental term of the employment contract *or* where "the employer's conduct in the particular circumstances passes so far beyond the bounds of reasonableness that the employee reasonably finds continued employment to be intolerable."[15] The employee may accept that repudiation, terminate the employment contract and seek the remedies that would have been available for a wrongful dismissal. The cases on constructive dismissal arising from intolerable conduct focus more on the employer's conduct than on analyzing the term of the employment contract that is breached. Nevertheless, there must be a breach of a term of the contract of employment to support the remedy. It was identified by Sanderman J. in *Lloyd* v. *Imperial Parking Ltd.*[16]

> A fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect and dignity. The standard that has to be adhered to by the employer is dependent upon the particular work environment.

Consequently, the law of constructive dismissal appears to have reached the position of recognizing an obligation of good faith performance of the employment contract, the fundamental breach of which will amount to a constructive dismissal.[17] It seems reasonable to suggest that a more minor breach of that obligation, while not amounting to constructive dismissal, should be remedied in damages.

In addition, it would reduce the disparity of treatment between employees subject to collective agreements and employees subject to individual contracts of employment. Section 80(1)

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[14]Swan, *supra* n. 13, at 328. See also, G. England, "Recent Developments in the Law of the Employment Contract: Continuing Tension Between the Rights Paradigm and the Efficiency Paradigm" (1995), 20 Queen's L.J. 557, at 585-591.

[15]*Shah* v. *Xerox Canada Ltd.* (1998), 49 C.C.E.L. (2d) 30 at 42 (Ont. Gen. Div.), appeal dismissed (2000), 49 C.C.E.L. (2d) 166 (C.A.).

[16]*Lloyd* v. *Imperial Parking Ltd.*, [1997] 3 W.W.R. 697 at 709 (Alta. Q.B.).

[17]M.E.A. Layton, "Intolerable Conduct Basis for Constructive Dismissal", *The Lawyers Weekly*, September 29, 2000, 10. J. Gilbert, "Constructive Criticism or Constructive Dismissal?", *The Lawyers Weekly*, May 4, 2001, 12.

of *The Labour Relations Act*[18] states that every collective agreement shall contain a provision that, in administering the collective agreement, the employer shall act reasonably, fairly, *in good faith* and in a manner consistent with the collective agreement as a whole.

Also, *The Human Rights Code*[19] prohibits, and provides extensive non-judicial remedies for, discriminatory practices[20] and harassment[21] in the workplace. The prohibition of discrimination and harassment in the workplace may comfortably be seen as an aspect of a broader general duty of the employer to act in good faith.

Professor England has drawn attention to the fact that several courts have held that an employer must act fairly and in good faith in exercising discretionary powers under the employment contract.[22] Courts are also increasingly imposing implied obligations of procedural fairness in respect of termination for cause. This is particularly apparent where the cause alleged is incompetence of the employee[23] or sexual harassment.[24] It is a small step towards a generalized duty of good faith.

A duty to act in good faith will not significantly interfere with the efficiency concerns of employers. It does not impair their right to dismiss with reasonable notice for any reason. Freedom to act in a brutal and callous manner at any time is unworthy of protection.

A duty of good faith conduct may improve the tone of the workplace and improve the employment relationship. Few would deny the beneficial impact of the legislative initiatives combating sexual harassment in the workplace. One might expect employers, as a class, to be responsive to the law's demands in respect of civilized conduct.

The House of Lords in *Malik* v. *Bank of Credit and Commerce International SA* has recognized that there is an implied term in an individual employment contract that an employer shall not, "without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and

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[18]*The Labour Relations Act*, C.C.S.M. c. L10.

[19]*The Human Rights Code*, C.C.S.M. c. H175.

[20]*The Human Rights Code*, C.C.S.M. c. H175, s. 14.

[21]*The Human Rights Code*, C.C.S.M. c. H175, s. 19.

[22]G. England, *Individual Employment Law* (2000) 67.

[23]*Id.*, at 264-265.

[24]England, *supra* n. 22, at 267.

employee."[25] The facts of the case were unusual. The defendant bank had, unknown to the plaintiff employees, acted in a fraudulent and corrupt manner. Eventually the bank collapsed and the plaintiffs suffered a stigma by association with their former employer which damaged their future job prospects. The bank was held liable for breach of the employment contract. There is an obvious affinity between an implied obligation of trust and confidence in the performance of the employment contract and one of good faith conduct in the performance of the employment contract. Intriguingly, however, this has not led the English courts to impose an obligation of good faith conduct in the *termination* of employment.[26] A coalescence of *Wallace* and *Malik* would create a general duty of good faith conduct in the performance and termination of the employment relationship.

The duty of good faith conduct provides a reasonable and reciprocal obligation to the bundle of implied obligations imposed on employees. Employees have obligations of honesty, obedience, competence, good behaviour and punctuality. They must advance their employer's business interests and must not wrongfully exploit or abuse the employer's interests.[27] Collectively, these individual obligations reflect aspects of good faith in the performance of the employment contract. It does not seem unreasonable to impose similar standards of conduct on the employer.

Finally, there are indications that some Canadian courts are comfortable with the notion of a generalized obligation of good faith performance in the performance of the employment contract. *Marlowe* v. *Ashland Canada Inc.*[28] is illustrative. One issue in that case was the plaintiff employee's loss of a bonus as a consequence of a poor performance review from his superior. Pitfield J. noted that the poor performance review was "unwarranted and undeserved"[29] and concluded that the conduct of the superior in reference to the review was "harsh, vindictive, malicious, ... offensive and reprehensible."[30] He had conducted an "unfair and mala fide review"[31] to deprive the plaintiff of the bonus he deserved. Pitfield J. held that *Wallace* was *inapplicable* because the employment review was not directly associated with the plaintiff's dismissal. Nevertheless, his Lordship stated:

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[25] *Malik* v. *Bank of Credit and Commerce International SA*, [1998] A.C. 20 at 45 (H.L.).

[26] *Johnson* v. *Unisys Ltd*, [2001] 2 W.L.R. 1076 (H.L.). The Court was heavily influenced by unfair dismissal legislation in England. See also, K. Dharmananda and H. Rai, "Denial of Damages for Dismal Dismissal" (2000), 116 L.Q.R. 194.

[27] England, *supra* n. 22, Chap. 4.

[28] *Marlowe* v. *Ashland Canada Inc.*, 2001 BCSC 954.

[29] *Id.*, at para.75.

[30] *Marlowe*, *supra* n. 28, at para. 150.

[31] *Marlowe*, *supra* n. 28, at para. 154.

> Employers are bound to deal with matters of employment *fairly and in good faith*. ...[T]he manner in which [the plaintiff] was reviewed ... was reprehensible and a substantial departure from the conduct and practices reasonably to be expected of an employer such as the defendant.
>
> [The employer] must be reminded by means of a financial penalty of its obligation to deal with employees in good faith regardless of the level of the employee's position in the company.[32] [emphasis added]

The Court's award of damages included an amount equivalent to the lost bonus and $20,000 in punitive damages for the breach of the obligation of good faith.

A general obligation of good faith performance may be opposed on a number of grounds. First, it may be argued that employees have the power to leave employment when they are treated badly. There is, therefore, a self-help remedy for bad faith conduct and no legal protection is required beyond that given by the law of constructive dismissal. Not all employees, however, have that sort of mobility. There may be a surplus of labour in the employee's field. Moreover, an employee may not want to find a new job. The work itself, relationships with co-workers, seniority and benefits may dissuade the employee from leaving. He or she just wants to be treated decently by management. The general duty of good faith may achieve this. Secondly, it can be argued that an obligation of good faith may introduce burdensome and unrealistic obligations of politeness, political correctness and gentility into the workplace. These fears may be allayed by the obstacles of expense, delay and uncertainty in the judicial remedial process and the assurance that judges will interpret "good faith" in a fair and reasonable manner. Finally, it may be argued that an action for bad faith performance of the employment contract will not likely be brought before termination of the employment relationship. This does not diminish the importance of the duty.

C. AN IMPLIED TERM IN THE EMPLOYMENT CONTRACT OF GOOD FAITH CONDUCT IN TERMINATION

This option suggests a more restricted obligation of good faith conduct. The obligation extends only to the manner of dismissal rather than the full performance of the employment contract.

This approach was favoured by the minority of the Supreme Court in *Wallace*. McLachlin J., speaking for a minority of the Court, took the view that the employment contract contains an implied term that the employer act in good faith in dismissing employees. This creates a distinct

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[32] *Marlowe*, *supra* n. 28, at para. 158 and 159.

and independent cause of action for breach of contract.[33] She rejected the view of the majority that bad faith dismissal may be remedied by extending the period of reasonable notice for a number of reasons.

First, reasonable notice represents the time needed to find another job and only factors relating to that issue should be taken into account in that determination. Secondly, damages must flow from an actionable wrong. Damages flowing from the wrongful dismissal are, in theory, calculated with reference to the reasonable time needed to find a new job. If damages are to be awarded for bad faith conduct during dismissal, an independent cause of action (the breach of an express or implied term of the contract) must be found to support that remedy. Thirdly, the concept of an implied term of good faith dismissal is most consistent with previous authorities and facilitates a rational and consistent development of employment law. Fourthly, the concept of an implied term enhances certainty and predictability in the law. The majority approach unduly complicates the calculation of reasonable notice. Clarity of analysis and predictability are enhanced by recognizing an independent cause of action and a related remedy.

The *content* of the implied term of good faith conduct in termination, identified by McLachlin J., reflects the obligations imposed by the majority judgment. The employer must act in good faith and ought to be candid, reasonable, honest and forthright with the employee and refrain from conduct which is untruthful, misleading or unduly insensitive. The remedy, however, would normally be an action for compensatory damages for mental distress and, where appropriate, the loss of reputation. Aggravated and punitive damages may be available.[34]

The disadvantages of this approach include the danger of much higher damage awards. Damages would be at large. They would be unrestrained by the employee's monthly income. Aggravated and punitive damages awards may further inflate the award. The limitation of the implied term against bad faith termination may also be seen as impeding a more principled, rational and general development of good faith obligations in the employment relationship. McLachlin J. was not unaware of the issue. She wrote:

> While some courts have recognized employer obligations of good faith outside of the dismissal context ..., this case does not require us to go beyond the dismissal context.[35]

Finally, it may be argued that obligations of good faith in the dismissal context or in the

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[33]This view has also been supported by R.B. Schai, "Aggravated Damages and the Employment Contract" (1991), 55 Sask. L. Rev. 345 at 363 and I. Christie, G. England and W.B. Coner, *Employment Law in Canada* (2nd ed., 1993) 750.

[34]See *Whiten* v. *Pilot Insurance* (1999), 170 D.L.R. (4th) 280 (Ont. C.A.), where the Court awarded punitive damages against an insurer in breach of its implied obligation to deal in good faith with the claims of its insured.

[35]*Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at 757.

context of the total performance of the contract fail to address the central concern of employees. They do nothing to prevent termination for any reason, so long as it is coupled with reasonable notice and decent, humane conduct.

D. A TORT OF BAD FAITH DISMISSAL

This option does not differ from the implied contractual obligation of good faith conduct in dismissal other than to ground the obligation in tort law rather than contract law. The content of the obligation would not differ. There may be some advantages of remedial flexibility in tort law. Judges are more comfortable in providing aggravated or punitive damages in tort cases than those in contract. It may, however, be preferable to develop the obligation of employers within the vehicle of the employment contract since it is the primary repository of the rights and duties of employers and employees. It may facilitate a more systematic and rational development of the employment relationship. A statutory implied term of good faith dismissal would not, however, impede the use or future development of tortious remedies.[36] The law generally favours a concurrence of causes of action and there is no reason to suggest an exclusivity of the contractual regime in these circumstances.

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[36]E.g. *Rahemtulla* v. *Vanfed Credit Union*, [1984] 3 W.W.R. 296 (B.C.S.C.).

CHAPTER 7

RECOMMENDATIONS

In examining the options for reform of the law relating to individual contracts of employment outlined in Chapter 6, we have given consideration to a number of general principles. These are sometimes complementary and sometimes contradictory but they are all worthy of weight in determining the delicate balance of responsibilities between employers and employees subject to individual contracts of employment:

- The employment relationship is of great importance not only globally to the economic productivity and wealth of society but also individually to employers and employees;

- There is an inherent imbalance of power in favour of the employer in most employment relationships. Legal principles have gradually evolved to establish greater employee rights and protections to offset that power imbalance;

- The employment relationship is particularly important to employees, not only as an economic engine for personal and family well-being but also as a critical component of the employee's personal identity, self-worth, reputation, social network and enjoyment of life; and

- Due to the competitive nature of the market place, both nationally and globally, and the efficiency concerns of Manitoban employers, legal rules which impact adversely on the competitiveness of business ultimately affect everyone in the province.

We also believe:

- That the law should reflect the standards of conduct of responsible, reasonable and fair employers and the reasonable expectations of honest employees; and

- That humane, decent and fair conduct on the part of employers is not detrimental to the efficiency concerns of employers. Indeed employees who are treated poorly are likely to exercise their own self-help remedies, undermining morale, reducing productivity and exhibiting less enthusiasm for the promotion of their employer's business interests.

In addition, we have taken into account the general public policy initiatives reflected in existing provincial legislation relating to employment.

We do not favour any change in the traditional power of employers under indeterminate individual contracts of employment to dismiss employees without cause, subject to reasonable

notice of termination or compensation in lieu thereof and subject to good faith conduct in the termination process. Moreover, the possible adoption of an extended meaning of "just cause" to include dismissal because of economic exigency or for other *bona fide* business reasons does not persuade us to take this step. Our reasons for maintaining the *status quo* in respect of the power of dismissal without cause include the following.

First, we have insufficient empirical evidence and expert economic analysis to determine the consequences of such a change in the common law of individual contracts of employment. We believe that radical reform of this kind should not be recommended without greater information as to the likely economic impact of such a change in the market place. Secondly, such a reform would likely impact adversely on the efficiency interests of employers. Employers would be required to justify dismissals by establishing that they had just cause or other "good reasons" for down-sizing or re-organizing their labour force. Thirdly, most North American jurisdictions do not protect employees under individual contracts of employment from dismissal without cause. The reform would put Manitoba out of step with most other jurisdictions with which Manitoban businesses must compete. Finally, this reform would require the establishment of regulations and procedures similar to those found in the *Canada Labour Code*. Substantial resources would be needed in order to cover all unorganized labour in the province.

Nevertheless, the Commission notes, in passing, the dichotomy in treatment of unionized employees who, under collective agreements, enjoy much greater job security than employees under individual contracts of employment. An argument may be made that the legislature should change the law to provide greater job security of the kind enjoyed by organized labour. This is a fertile field for empirical research and public policy debate.

RECOMMENDATION 1

That employers retain the power to dismiss an employee under an indeterminate individual contract of employment for any reason provided that they give the employee reasonable notice or salary in lieu thereof.

We strongly support the view that employers owe a duty of good faith in the termination of individual contracts of employment. We also recognize the shortcomings of the remedial scheme set out in *Wallace*. It results in the kind of unjustifiable distinctions and uneven decision-making outlined in Chapters 4 and 5. We prefer the approach of McLachlin J. who found an implied obligation of good faith in the termination of an individual contract of employment, the breach of which should be remedied by an action for damages for breach of contract. This option would not affect the content of an employer's obligation as outlined by the majority in *Wallace*. That obligation has been well received. It appears to have created no insoluble obstacles to employers' efficiency concerns and it is compatible with the reasonable expectations of honest employees and the norms of responsible employers. Moreover, it protects the employee at a time of maximum vulnerability. We believe that the remedial problems associated with *Wallace* can be resolved by adopting the minority position. The obligation of good faith termination is better

characterized as an implied term of the contract, the breach of which can be remedied by an action for damages. The plaintiff's loss may be assessed and compensated fully and transparently.

It is also appropriate to include the implied term in both indeterminate individual contracts of employment and those with defined termination provisions. The presence of a definite termination date, a fixed notice period or other termination protocol should not displace the obligation to act in good faith in respect of dismissal under those provisions.

RECOMMENDATION 2

That individual contracts of employment be subject to an implied term that the employer will act in good faith in the manner of dismissal of employees.

In our view, the implied term to exercise good faith in the dismissal process should apply notwithstanding an express agreement between the parties to the contrary. The inequality of bargaining power between most employers and their employees provides opportunities to impose terms which would be unacceptable if power were shared more equitably. Although judges control the application of contractual exclusion clauses with a variety of limiting techniques, it is our view that it is simpler and fairer to disallow the exclusion of the good faith requirement.

RECOMMENDATION 3

That the implied obligation on employers in individual contracts of employment to act in good faith in the manner of dismissal of employees apply notwithstanding any agreement between the parties to the contrary.

The breach of the implied term of good faith dismissal should be remedied by an award of damages which recognizes the employee's full loss, including both pecuniary and non-pecuniary loss. Compensation of the employee's non-pecuniary losses is, of course, particularly appropriate in respect of bad faith dismissal. Such loss is a typical consequence of a breach. Furthermore, we are of the opinion that, in addition to compensatory damages, judges should be expressly empowered to award: aggravated damages, to recognize the particularly intense effect of serious misconduct on the employee; *and*, punitive damages, to deter and punish the serious misconduct of the employer.

RECOMMENDATION 4

That the remedies for a breach of the implied obligation to act in good faith in the manner of dismissal of an employee subject to an individual contract of employment include compensatory, aggravated and punitive damages.

We do not favour a tort of bad faith dismissal as the substance of the tort would mirror the implied term found in recommendation 2. We believe it is preferable to adjust the contractual

obligations of the parties since the contract is the primary repository of their rights and obligations. A tort of bad faith would not increase the protection of employees recommended herein. We do not, however, favour the limitation of tort rights in this context. Employees may be able to resort to existing or future tort law to provide an alternative or additional remedy for the wrongful conduct of their employer.

RECOMMENDATION 5

That no independent tort of bad faith dismissal be established.

We have given much thought to the issue of extending the implied obligation of good faith in the termination of an individual contract of employment to the performance of it. The argument for an implied term of good faith in the performance of the contract is less compelling than that for good faith conduct in dismissal because it is at dismissal that the employee is particularly vulnerable.

Nevertheless the dichotomy between performance and termination is difficult to defend given the inequality of power between most employers and their employees and the recognized vulnerability of employees in the workplace. We reiterate that good faith connotes honest, forthright and decent conduct on the part of the employer, conduct which is consistent with that of responsible employers, good personnel practices and the reasonable expectations of honest employees. This standard of conduct does not affect the power of employers to dismiss for any reason, nor interfere with substantive business decision-making. We do not believe, therefore, that an obligation of good faith performance will unduly impinge on the efficiency concerns of employers. Indeed, good faith conduct is likely to enhance the ambience of the workplace and improve productivity.

Here we re-state some supporting factors for an implied obligation of good faith of the employer in the performance of the employment contract as outlined in Chapter 6, item B.

1. The employment contract is of central importance to society as a whole. Its impact on the economic, social and emotional well being of employees supports an obligation of good faith conduct on employers in the performance of the employment contract.

2. The doctrine of constructive dismissal implicitly recognizes the employer's obligation to deal with employees in good faith throughout the performance of the employment contract.

3. An obligation of good faith and fairness has been recognized by the courts in respect of the employer's exercise of discretionary powers under the contract and obligations of procedural fairness have been imposed in respect of dismissal for incompetence and sexual harassment.

4. An obligation of good faith in the performance of *all* contracts is increasingly recognized

in Canadian contract law.[1]

5. Courts have begun to recognize a general obligation of good faith in the performance of contracts of employment.[2]

6. An obligation of good faith performance is legislatively implied into every *collective agreement*.[3]

7. Under *The Human Rights Code*, no employer may discriminate against or harass an employee.[4]

We believe that these factors support the development of legislation that would create an implied obligation of good faith in the performance of the employment contract and that its formal adoption would not create a radical change in the law. We recognize that "good faith" is not a term of precision but we have confidence that it will be applied in a reasonable manner and that judges will draw a fair balance between the interests of employers and employees. On the other hand, we anticipate that "bad faith" will be interpreted by the courts to apply to serious misconduct on the part of the employer. It will not be established by isolated acts of political incorrectness, rudeness or bad temper. It will require proof of a sustained pattern of misconduct which is intolerable to a reasonable employee. A useful description of bad faith conduct in the context of employment is found in the judgment of Pitfield J. in *Marlowe* v. *Ashland Canada Inc.* He spoke of conduct that was "a substantial departure from the conduct and practices reasonably to be expected of an employer such as the defendant."[5] Moreover, the burden of proof will be on the employee to establish acts of bad faith. The bad faith dismissal cases will provide some guidance in defining bad faith conduct. Conduct which is forbidden at termination should not be permitted in the performance of the contract.

We anticipate that most claims will be pursued after the termination of the employment relationship and many may involve both bad faith dismissal and bad faith performance. This will permit judicial consideration of the whole relationship and will avoid the unwarranted focus on termination alone. An implied obligation of good faith performance may also provide some support for employees in the informal resolution of disputes in the course of employment. Furthermore, a serious breach of the implied term may amount to a constructive dismissal.

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[1] See S.K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 Can. Bar Rev. 70.

[2] *Marlowe* v. *Ashland Canada Inc.*, 2001 BCSC 954.

[3] *The Labour Relations Act*, C.C.S.M. c. L10, s. 80.

[4] *The Human Rights Code*, C.C.S.M. c. H175.

[5] *Marlowe*, *supra* n. 2, at para 158.

The concept of good faith performance may also provide a transparent vehicle under which the various discrete judicial initiatives of good faith and procedural fairness might be rationalized and developed in a systematic manner. Procedures and protocols for promotion, demotion, discipline, benefits and privileges in the workplace are increasingly subject to judicial control. An implied obligation of good faith may facilitate a more systematic approach.

RECOMMENDATION 6

That individual contracts of employment be subject to an implied term that the employer act in good faith in the performance of the contract.

We are of the opinion that the implied term to exercise good faith in the performance of the individual contract of employment should apply notwithstanding an express agreement between the parties to the contrary. The inequality of bargaining power between most employers and their employees provides opportunities to impose exclusionary terms which would be unacceptable if power was shared more equitably. Although judges control the application of contractual exclusion clauses with a variety of limiting techniques, it is our view that it is simpler and fairer to disallow the exclusion of the good faith requirement.

RECOMMENDATION 7

That the implied obligation on employers in individual contracts of employment to act in good faith in the performance of the contract apply notwithstanding any agreement between the parties to the contrary.

The breach of the implied term of good faith performance should be remedied by an award of damages which recognizes the employee's full loss including both pecuniary and non-pecuniary loss. Compensation for the employee's non-pecuniary losses are, of course, particularly appropriate in respect of bad faith performance. Such loss is a typical consequence of breach. Furthermore, we are of the opinion that, in addition to compensatory damages, judges should be expressly empowered to award: aggravated damages, to recognize the particularly intense effect of serious misconduct on the employee; *and*, punitive damages, to deter and punish the serious misconduct of the employer. Punitive damages are particularly important for the breach of good faith performance. It may be difficult to establish loss in some instances of breach and in those instances courts should have the power to impose an appropriate sanction.

RECOMMENDATION 8

That remedies for a breach of the implied obligation to act in good faith in the performance of the individual contract of employment include compensatory, aggravated and punitive damages.

We recognize that conduct which is in breach of the implied terms of good faith in the

termination and performance of an individual contract of employment may independently be a breach of *The Human Rights Code*. The concept of good faith is broader than that of discrimination but the latter may also comfortably be characterized as bad faith. In these situations, the issue of the relationship between the breach of contract and the availability of a remedy under the administrative machinery of the Human Rights Commission arises. One view is that the Human Rights Commission should have exclusive jurisdiction over discrimination cases. The other view is that there should be concurrent remedies available for aggrieved employees. Some years ago a similar issue arose before the Supreme Court. In *Seneca College of Applied Arts & Technology* v. *Bhadauria*,[6] the Court declined to develop a tort of discrimination on the grounds that Human Rights Codes were the exclusive remedial regimes for discrimination falling within their scope. However, the civil action for damages for breach of contract may be attractive to litigants for a number of reasons including independence from the administrative machinery of the Commission and more generous remedies. We see no need to restrict the remedies for bad faith conduct and therefore favour a concurrence of remedies. Indeed, the current position under *Wallace* does not appear to rule out the civil remedy of increased notice where a termination has been prompted by discrimination.

RECOMMENDATION 9

That employees may pursue any available remedy for breach of the implied obligation to act in good faith in the performance or termination of the employment contract including an action for breach of contract, an action in tort or a complaint to the Manitoba Human Rights Commission.

The changes to the law of individual contracts of employment are designed to improve the remedies for bad faith conduct through the judicial process. We recognize the impediments of delay, expense and unpredictability of the civil process. However, this ought not be used as an excuse for a failure to reform the law in this area. We note that civil claims for bad faith dismissal are common and we anticipate that bad faith performance issues will often be litigated in conjunction with dismissal litigation. We also anticipate that bad faith performance will be interpreted narrowly to remedy serious misconduct of a kind that might reasonably prompt use of the civil process. We suggest that these reforms to the common law be embodied in discrete legislation that might be known as *The Employment Contracts Act*.

RECOMMENDATION 10

That the above recommendations be incorporated into new legislation entitled *The Employment Contracts Act.*

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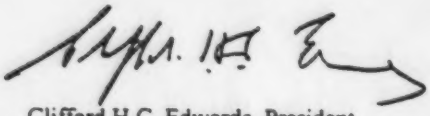
[6] *Seneca College of Applied Arts & Technology* v. *Bhadauria*, [1981] 2 S.C.R. 181.

This is a Report pursuant to section 15 of *The Manitoba Law Reform Commission Act*, C.C.S.M. c. L95, signed this 11th day of December 2001.



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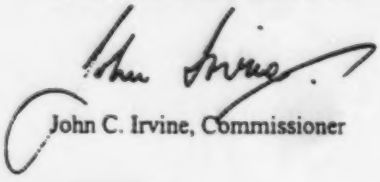

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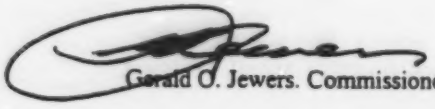

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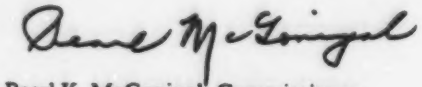

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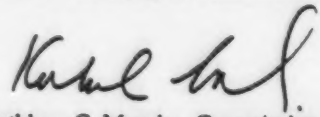

Kathleen C. Murphy, Commissioner

APPENDIX A

JUDICIAL FINDINGS OF BAD FAITH DISMISSAL DECISIONS SINCE *WALLACE* v. *UNITED GRAIN GROWERS* CASE SUMMARIES - CURRENT TO JUNE 30, 2001

ALBERTA			
Case name	Facts	Decision	Award[1]
Tanton v. Crane Canada Inc (2000), 278 A.R. 137 (Q.B.)	*Position at termination: Warehouseman* *Length of employment: 25 years* The defendant moved the plaintiff from an indoor to an outdoor position which he found too difficult, given the various medical conditions with which he lived. When the plaintiff complained, the defendant told him he had do the new job whereupon the plaintiff quit. The defendant's quick acceptance of the plaintiff's resignation suggested that the defendant wanted the plaintiff to quit.	The Court held that the plaintiff was constructively dismissed and awarded him 22 months pay in lieu of notice, extended by 2 months to compensate for the manner of dismissal. The defendant was aware of the plaintiff's limitations and selected tasks for him on that basis. In doing so, they limited the skills the plaintiff was able to develop. It was unrealistic for the defendant to expect the plaintiff to succeed in the new position.	
Mitchell v. Westburne Supply Alberta (2000), 260 A.R. 38 (Q.B.)	*Position at termination: Purchasing Manager* *Length of employment: 29 years* The plaintiff was unhappy with his compensation, promotional resources and workload. After a disagreement regarding the scope of the plaintiff's duties, the defendant dismissed the plaintiff. The defendant acted in bad faith by leaving the plaintiff off the company's organizational chart, excluding him from meetings he once attended, withholding information which was relevant to his job, excluding him from a memo of commendation, refusing to address his concerns in a constructive manner, and keeping a file to document possible misconduct.	The Court held that the appellant was dismissed without cause or, in the alternative, was constructively dismissed and awarded him 24 months pay in lieu of notice. The Court added 3 months to compensate for the defendant's bad faith conduct. The Court also awarded the plaintiff his bonus entitlement for the last year of work and the 2 year notice period.	$160,000 (reasonable notice) $20,000 (bad faith) $47,800 (bonus entitlement)

[1]Only judgments which specify the amount of the monetary award are included in this column.

ALBERTA			
Case name	Facts	Decision	Award
Beadall v Chevron Canada Resources Ltd (1999), 243 A R 72 (Q B)	*Position at termination Programmer/analyst* *Length of employment 7 ½ years* The plaintiff, with the defendant's approval, took a 3 year leave of absence to obtain an engineering degree Upon graduation, she sought re-instatement but there was no job for her due to changed market conditions The defendant took the position that the plaintiff's employment was terminated when the leave agreement expired and it was under no obligation to provide further notice or salary in lieu of notice	The Court held that the plaintiff was not wrongfully dismissed and that the defendant did not act in bad faith However, the Court further held that the defendant could not treat the expiry of the leave agreement as the effective termination of the plaintiff's employment and that the plaintiff was entitled to 7 ½ months pay in lieu of notice This was extended by 1 ½ months under the *Wallace* principle to compensate for the "considerable anguish" caused by the defendant's conduct in refusing to pay severance	$37,500 (reasonable notice) $7,500 (bad faith)
Frank v Federated Cooperatives Ltd (1998), 211 A R 288 (Q B)	*Position at termination Building Materials Manager* *Length of employment 22 years* The defendant dismissed the plaintiff due to a minor breach of the defendant's loss prevention policy The defendant investigated behind the plaintiff's back, gave him no opportunity to explain, coerced a resignation from him, and treated him like a criminal when he cleared his personal effects from the office	The Court held that the breach was insufficient to be considered just cause and awarded the plaintiff 15 months pay in lieu of notice The Court added 5 months to compensate for the defendant's bad faith conduct The Court also awarded damages for loss of employment benefits	$55,485 (reasonable notice) $18,495 (bad faith) $8,431 (loss of employment benefits)
Chan v Meyer s Sheet Metal Ltd, 1998 ABPC 144	*Position at termination Sheet metal worker* *Length of employment 4 years* The plaintiff was harassed and abused at work Other employees threatened to quit if the plaintiff continued to work for the company As a result, the defendant company laid the plaintiff off without notice, citing a work shortage	The Court held that the plaintiff was wrongfully dismissed and that the defendant acted in bad faith The Court awarded the plaintiff 3 months pay in lieu of notice The Court did not specify which portion of the award was to compensate for the defendant's bad faith conduct	$5,850 (reasonable notice and bad faith)
Hammond v Earls West Hills Ltd, 1998 ABPC 147	*Position at termination Waitress* *Length of employment 7 months* The defendant fired the plaintiff when she failed to bring in credit card slips she had forgotten to deposit on a previous shift The delay was due to car trouble At dismissal, the defendant told the plaintiff that she was untrustworthy, irresponsible and disrespectful	The Court held that the single mistake was not serious enough to justify dismissal and awarded the plaintiff 2 weeks pay in lieu of notice The defendant's comments added to the injury and justified an award of aggravated damages rather than an extension of the notice period	$750 (reasonable notice) $1,000 (aggravated damages)

ALBERTA			
Case name	Facts	Decision	Award
D.M.D. v. Artesian Realty and Insurance (G.P.) Ltd., 2001 ABPC 86	*Position at termination: Insurance agent* *Length of employment: 5 months* The defendant induced the plaintiff to leave secure employment. The plaintiff did not meet the defendant's expectations but the defendant did not tell the plaintiff or give her an opportunity to improve her performance. After deciding to fire the plaintiff, the defendant met with her and told her of her shortcomings and the fact that her salary exceeded that of other employees. She did not fire the plaintiff at the meeting or give her any indication that she might be fired. The day after the meeting, the defendant sent the plaintiff a letter of termination.	The Court held that the plaintiff was wrongfully dismissed and awarded 2 weeks pay in lieu of notice. The Court extended this by 6 weeks to compensate for the defendant's bad faith. Although the defendant was not untruthful or misleading, she was unduly insensitive.	$900 (reasonable notice) $2,700 (bad faith)

BRITISH COLUMBIA			
Case name	Facts	Decision	Award
Wright v. Chilliwack Community Services, 2000 BCSC 972	*Position at termination: Chief Executive Officer* *Length of employment: 4 years* The defendant summarily dismissed the plaintiff. As she held a highly visible position, her dismissal garnered media coverage that extended beyond Chilliwack and she was unable to obtain similar work. The defendant also failed to honour its promise to pay an employment services agency to help the plaintiff to find a new job.	The Court held that the plaintiff had been wrongfully dismissed and awarded her 12 months pay in lieu of notice. This included an extension for the bad faith conduct although the decision does not specify which portion of the award is attributable to bad faith.	
Hamer-Jackson v. McCall Pontiac Buick Ltd (1998), 38 C.C.E.L. (2d) 189 (B.C.S.C.); (2000), 77 B.C.L.R. (3d) 214 (B.C.C.A.)	*Position at termination: Car sales manager* *Length of employment: 13 years* The plaintiff was constructively dismissed when the owner of the defendant dealership hired his son as the general sales manager. The owner also circulated rumours about the plaintiff's alleged illegal business dealings, and was vindictive in dealing with the plaintiff's new business.	The Court held that the plaintiff was constructively dismissed and awarded him 13 months pay in lieu of notice. This was extended by 6 months to compensate for the defendant's bad faith conduct. The decision was affirmed on appeal. Leave to appeal to the Supreme Court of Canada was denied.	$140,365 (reasonable notice) $64,784 (bad faith)
Truong v. British Columbia (1997), 40 B.C.L.R. (3d) 208 (B.C.S.C.); (1999), 178 D.L.R. (4th) 644 (B.C.C.A.)	*Position at termination: Court interpreter* *Length of employment: 4 years* The defendant dismissed the plaintiff because of complaints against her. The defendant did not investigate the veracity of the complaints and the plaintiff was not given a chance to defend herself. After her dismissal, the defendant sent a memo to other government departments advising them not to hire the plaintiff.	The Court held that the plaintiff had been wrongfully dismissed and awarded her 6 months pay in lieu of notice, extended by 2 months to compensate for the defendant's bad faith conduct. The Court also awarded an amount to cover the cost of the plaintiff's retraining. The decision was upheld on appeal, except for the award for aggravated damages, which was reversed.	$22,500 (reasonable notice) $7,500 (bad faith) $2,500 (retraining)

BRITISH COLUMBIA			
Case name	Facts	Decision	Award
Cassady v. Wyeth-Averst Canada Inc (1998), 163 D.L.R. (4th) 1 (B.C.C.A.)	*Position at termination: Sales representative* *Length of employment: 3 months* The plaintiff's supervisor reported to his superiors that the plaintiff was rude and insolent after which she was dismissed. In addition, the defendant circulated rumours that the plaintiff had been fired from her previous job and that she was incompetent.	At trial, the jury found that the defendant had wrongfully dismissed the plaintiff and had negligently caused her mental distress. The jury awarded 9 months pay in lieu of notice and $10,000 for the negligent infliction of distress and $62,000 in punitive damages. On appeal, the Court upheld the reasonable notice award but overturned the damages for mental distress and punitive damages, instead extending the award of pay in lieu notice by 3 months to compensate for the defendant's bad faith.	$30,933.30 (reasonable notice) $10,000 (bad faith)
S.S. v. Port Alberni Friendship Center, 2000 BCSC 106	*Position at termination: Legal information worker* *Length of employment: 7 years* The defendant, relying on the uncorroborated allegations of an emotionally disturbed client, dismissed the plaintiff. The defendant did not investigate, did not allow the plaintiff to defend herself, and failed to follow its internal procedures when it dismissed the plaintiff.	The Court held that the plaintiff had been dismissed without cause and was entitled to 7 months notice. The Court extended the notice by 6 months to compensate for the defendant's bad faith.	$21,756 (reasonable notice) $16,648 (bad faith)
Rowbotham v. Addison, 2000 BCSC 218	*Position at termination: Accounts receivable clerk* *Length of employment: 18 years* The plaintiff was on medical leave for approximately six months. When she returned to her job, she was told to sort files in the basement.	The Court held that the plaintiff had been constructively dismissed and awarded her 3 months pay in lieu of reasonable notice. The Court added 1 month to compensate for the insensitive and demeaning manner of dismissal.	
Daley v. Golden Child Care Society, 2000 BCSC 50	*Position at termination: Child care supervisor* *Length of employment: 10 years* The plaintiff was dismissed without notice on the grounds of dishonesty and incompetence.	The Court held that the plaintiff was dismissed without cause and was entitled to 8-12 months pay in lieu of notice. The Court also found that the defendant was not candid, reasonable, or honest with the plaintiff, and fixed the total notice period at 11 months.	$37,400 (reasonable notice and bad faith)
Robinson v. Fraser Wharves Ltd., 2000 BCSC 199	*Position at termination: Operation manager* *Length of employment: 9 years* The plaintiff was charged with conspiracy to traffic in a narcotic and was fired three days later. The Crown stayed all charges; however, the defendant maintained that the plaintiff had been fired for cause until examinations for discovery, 10 months later. The plaintiff was not given a chance to explain or defend himself. It was impossible for the plaintiff to find other employment as the defendant refused to provide a reference letter.	The Court held that the plaintiff was entitled to 15 months pay in lieu of notice. The Court further held that the defendant was reckless in its pursuit of allegations against the plaintiff and added 3 months to the notice period.	$73,850 (reasonable notice) $14,770 (bad faith) $4,500 (pension contributions) $3,450 (bonus)

BRITISH COLUMBIA			
Case name	Facts	Decision	Award
Smart v. *McCall Pontiac Buick Ltd.*, (7 September 1999), Kamloops 22360 (B.C.S.C.)	*Position at termination: General Manager* *Length of employment: 13 years* The defendant misled the plaintiff by suggesting he would sell him an interest in the car dealership. To ensure the advancement of his son in the dealership, the owner demoted the plaintiff and then made false allegations of incompetence, theft, and insubordination to manufacture cause for his dismissal.	The Court held that the plaintiff was constructively dismissed and awarded 18 months pay in lieu of reasonable notice. The Court added another 6 months to compensate for the defendant's bad faith.	$225,000 (reasonable notice) $75,000 (bad faith)
Clendenning v. *Lowndes Lambert (B.C.) Ltd.* (1998), 41 C.C.E.L. (2d) 58 B.C.S.C.; (2000), 193 D.L.R. (4th) 610 (B.C.C.A.)	*Position at termination: Office Manager* *Length of employment: 9 years* The plaintiff was constructively dismissed when she was demoted from office manager to glorified telemarketer. The defendant insisted the plaintiff had been dismissed for cause. The reasons given were misuse of her cellular phone, her relationship with a man of dubious character, alleged drug abuse, forgery, incompetence and fraud. None of these charges were substantiated except the cell phone problem. The defendant maintained these allegations even after the Court held that they were unfounded.	The Court held that the plaintiff was constructively dismissed and was entitled to 6 months pay in lieu of reasonable notice. This period notice was extended by 36 months (to the date of judgment). The Court of Appeal reversed the trial decision with respect to the amount of notice and substituted 12 months in total.	
Stafford v. *British Columbia Chicken Marketing Board*, (27 November 1998), Vancouver C983507 (B.C.S.C.)	*Position at termination: General Manager* *Length of employment: 30 years* The plaintiff was dismissed without cause or notice. The bad faith conduct complained of did not occur at termination but in the conduct of the litigation. The defendant withheld money it admitted it owed to the plaintiff and made irrelevant allegations of misconduct.	The Court held that the plaintiff was entitled to 24 months notice as provided in his employment contract. The Court extended this by 2 weeks to compensate for the defendant's bad faith.	$204,570.06 (reasonable notice) $4,470 (bad faith)
Brougham v. *Carrier-Sekani Tribal Council*, (24 September 1998), Prince George 34029 (B.C.S.C.)	*Position at termination: General Manager* *Length of employment: 12 years* The plaintiff was dismissed without cause or notice. The Chief called the plaintiff by telephone to tell her that her employment had been terminated and that a letter of termination would follow.	The Court described the defendant's conduct on termination as callous, insensitive and shabby. Without specifying which portion was attributable to the defendant's bad faith, the Court awarded 15 months pay in lieu of notice.	$63,676 (reasonable notice and bad faith)
Horvath v. *Nanaimo Credit Union*, (15 July 1998), Nanaimo S16202 (B.C.S.C.)	*Position at termination: Assistant Manager of Member Services* *Length of employment: 13 years* The plaintiff was placed on a 90 day probation period due to concerns about her performance. The defendant did not tell the plaintiff she could be summarily dismissed while on probation. During the probation period, the plaintiff was ill and very stressed by management scrutiny. Defendant dismissed the plaintiff without notice 40 days into the probation period.	The Court held that the plaintiff was entitled to 12 months pay in lieu of notice. This was extended by 4 months to compensate for the defendant's bad faith conduct.	$40,000 (reasonable notice) $13,333.33 (bad faith)

BRITISH COLUMBIA			
Case name	Facts	Decision	Award
Martin v International Maple Leaf Springs Water Corp. (1998), 38 C.C.E.L. (2d) 128 (B.C.S.C.)	*Position at termination: Senior Marketing Director* *Length of employment: 9 months* Defendant dismissed plaintiff due to false allegations of dishonesty and alcohol abuse	The Court held that the plaintiff was wrongfully dismissed and entitled to 6 months pay in lieu of notice. The Court awarded a further 3 months pay to compensate for the defendant's bad faith. The Court also awarded punitive damages of $35,000.	
Birch v. Grinnell Fire Protection a division of Tyco International of Canada, (2 July 1998), Vancouver C970973 (B.C.S.C.)	*Position at termination: Manager* *Length of employment: 19 years* Defendant eliminated the plaintiff's department (and his position) while he was on holidays. The plaintiff agreed to revert to his former position at a significant pay loss. The defendant terminated the plaintiff seven months later with two days notice on the basis of work shortage. The defendant alleged just cause for the termination, a position it maintained until late in the trial.	The Court awarded the plaintiff 18 months pay in lieu of reasonable notice. This was extended by 2 months to compensate the plaintiff for the callous and high handed manner in which he was terminated.	$77,650 (reasonable notice and bad faith)
Stolle v. Daishinpan (Canada) Inc. (1998), 37 C.C.E.L. (2d) 18 (B.C.S.C.)	*Position at termination: Assistant Manager* *Length of employment: 6 years* The plaintiff returned from maternity leave to find that her duties had been substantially reduced. Six weeks later, defendant informed her that her position was eliminated. The defendant then required that the plaintiff sign a release to get her severance package.	The Court held that the plaintiff was entitled to 5 months pay in lieu of notice. This period was extended by 3 months to compensate for the defendant's "high handed" conduct.	$22,400 (reasonable notice and bad faith)
Boule v. Ericatel Ltd., (8 June 1998), Vancouver C965620 (B.C.S.C.)	*Position at termination: Branch Manager* *Length of employment: 13 years* The plaintiff was dismissed without cause. Prior to the trial, the defendant made allegations of fraud against the plaintiff.	The Court held that the termination clause in the plaintiff's contract was too ambiguous to be enforceable and awarded 14 months pay in lieu of notice. This period was extended by 4 months to compensate the plaintiff for the defendant's false allegations of dishonesty.	
Richardson v. AIC Ltd., (30 August 1999), Vancouver 98-47617 (B.C.P.C.)	*Position at termination: Receptionist* *Length of employment: 11 months* The defendant fired the plaintiff when she said she would quit if the defendant did not resolve a conflict she was having with another employee. The defendant would not give the plaintiff a reference letter, and alleged cause for the dismissal until the eve of the trial.	The Court held that the plaintiff was entitled to 1 month's pay in lieu of notice. A further month was added to compensate for the defendant's bad faith conduct.	$2,625 (reasonable notice) $2,625 (bad faith)
Robertson v. Red Robin Restaurants of Canada Ltd., (27 February 1998), Vancouver 96-29769 (B.C.P.C.)	*Position at termination: Assistant Manager* *Length of employment: 5 years* The defendant terminated the plaintiff at a meeting in the workplace in front of other staff. The defendant told the plaintiff he did not have the "right stuff" and he could choose to quit or be fired.	The Court held that the plaintiff was wrongfully dismissed and awarded 15 weeks pay in lieu of notice. This was extended by 2 months to reflect the defendant's insensitive and callous behaviour.	$3,538.46 (reasonable notice) less 5 weeks severance paid at termination $5,000 (bad faith)

BRITISH COLUMBIA			
Case name	Facts	Decision	Award
McKinley v. B C Tel (1999), 67 B.C.L.R. (3d) 337 (B.C.C.A.), (2001), 200 D.L.R. (4th) 385 (S.C.C.)	*Position at termination: Chartered Accountant* *Length of employment: 17 years* The plaintiff began to experience health problems and took a leave of absence. He wanted to return to work but asked to be re-assigned to a job with fewer responsibilities. The defendant agreed to accommodate the plaintiff but then terminated his employment.	The Court awarded the plaintiff 22 months pay in lieu of notice and extended it by 4 months for the defendant's bad faith conduct. The B.C. Court of Appeal set aside the judgment and ordered a new trial. The Supreme Court of Canada reinstated the trial decision.	$92,055.60 (reasonable notice) $16,737.40 (bad faith)
Mitu v. New Century Food & Paper Ltd., 2001 BCPC 105	*Position at termination: Delivery driver* *Length of employment: 1 year* The plaintiff took stress leave after being robbed of company and personal money upon leaving work. The defendant terminated the plaintiff's employment when he returned from stress leave suggesting that the plaintiff was a suspect in the robbery. In fact, the police had advised the defendant that the plaintiff was not a suspect. As well, the defendant refused to provide a reference letter, challenged the plaintiff's claim for workers compensation and did not provide the plaintiff with the minimum statutory severance.	The Court held that the plaintiff had been wrongfully dismissed and awarded 1 month pay in lieu of notice. This was extended by 4 months to compensate for the defendant's bad faith conduct.	

MANITOBA			
Case name	Facts of case	Decision of Court	Award
Kapitany v. Thomson Canada Ltd. (c.o.b. Winnipeg Free Press) (2000), 151 Man. R. (2d) 312 (Q.B.)	*Position at termination: Technical Maintenance Supervisor* *Length of employment: 23 years* The plaintiff's work evaluations began to decline after a new supervisor was installed. At a surprise meeting, the plaintiff's supervisor told him that he was not doing his job properly and that other employees had complained about him. He was told to choose between a buy-out or dismissal. The defendant asked the plaintiff to return his office keys and escorted him from the building.	The Court held that the plaintiff had been wrongfully dismissed and awarded 15 months pay in lieu of notice. This was extended by 8 months to compensate for the bad faith nature of the dismissal.	$91,247.97 (reasonable notice and bad faith)

MANITOBA			
Case name	Facts	Decision	Award
Whiting v Winnipeg River Brokenhead Community Futures Development Corp (1997), 116 Man R (2d) 89 (Q B), (1998), 159 D L R (4th) 18 (C.A.)	*Position at termination Business Executive* *Length of employment 5 years* The plaintiff ran one of two corporations which were amalgamated A government financial consultant and the executive of the second corporation became harsh critics of the plaintiff, and succeeded in pushing her from her job using a number of underhanded tactics These included a four-month probation for no particular reason, circulating false rumours about the plaintiff, and advising the Board to cut short the plaintiff's sick leave	The Court held that the plaintiff was constructively dismissed and awarded 6 months pay in lieu of notice, damages for mental distress and special damages (lost income) On appeal, the Court reversed the awards for mental distress and lost income and substituted an extension of 6 months to compensate for the defendant's bad faith conduct (12 months total)	$42,185 ?6 (reasonable notice and bad faith)
Delaquis v College de Saint-Boniface (2000), 144 Man R (2d) 266 (Q.B)	*Position at termination Registrar and student recruiter* *Length of employment 6 years* The plaintiff was fired nine days into his sick leave The parties had been unable to agree on the terms and conditions of his renewal contract Upon dismissal, the defendant invited the plaintiff to re-apply for his position The defendant failed to provide the plaintiff with a suitable reference letter	The Court held that the plaintiff was entitled to 12 months pay in lieu of reasonable notice, which award included compensation for the defendant's bad faith conduct	$61,046 (reasonable notice and bad faith)
Mrozowich v Grandview Hospital District #3B (1998), 125 Man R (2d) 259 (Q B)	*Position at termination Hospital Administrator* *Length of employment 3 years* The defendant decided to terminate the plaintiff's employment at a meeting which the plaintiff was unable to attend After the meeting (at 11 p.m.), members of the Board went to the plaintiff's home to deliver the letter of termination The letter referred to his absence from the meeting as one reason for his termination The hospital locks were changed that same evening and the plaintiff was required to remove his personal belongings under supervision. The defendant did not provide a reference or offer to assist the plaintiff with his job search.	The Court held that the plaintiff was wrongfully dismissed and entitled to 5-7 months pay in lieu of notice The Court further held that, due to the defendant's bad faith, the plaintiff was entitled to an additional 1-3 months - or 8 months in total	

NEW BRUNSWICK			
Case name	Facts	Decision	Award
Hampton v. *Thirty-Five Charlotte Ltd* (1999), 48 C.C.E.L. (2d) 96 (Q.B.)	*Position at termination: Building Maintenance Manager* *Length of employment: 8 ½ years* The defendant cited "shortage of work" when it let the plaintiff go. In fact, the defendant had hired someone to assist the plaintiff, and when the plaintiff left, the assistant took over the plaintiff's job. The defendant never criticized the plaintiff or warned him about the quality of his work. The defendant refused to give a letter of reference, harassed the plaintiff into signing a waiver, and alleged cause where none existed.	The Court awarded the plaintiff 8 ½ months pay in lieu of notice and extended this by 2 ½ months due to the defendant's bad faith conduct	$14,280 (reasonable notice) $4,200 (bad faith)

NEWFOUNDLAND			
Case name	Facts	Decision	Award
Squires v. *Corner Brook Pulp and Paper Ltd* (1994) 122 Nfld. & P.E.I.R. 91 (Nfld. S.C. T.D.); (1999), 175 Nfld. & P.E.I.R. 202 (Nfld C.A.)	*Position at termination: Head of Engineering Department* *Length of employment: 23 years* The plaintiff was dismissed during a five-minute meeting, in which he was not given a chance to respond to vague allegations of unsatisfactory performance in his letter of termination. The letter stated that the plaintiff should accept the defendant's position or they would fire him for unsatisfactory performance. The plaintiff had an excellent work history as shown by the various raises, bonuses and letters of commendation provided by the defendant over the years.	On appeal, the Court awarded the plaintiff 18 months pay in lieu of notice and an additional 6 months because of the defendant's bad faith conduct.	

NOVA SCOTIA			
Case name	Facts	Decision	Award
Anderson v. *Tescult Eduplus Inc* (1999), 179 N.S.R. (2d) 284 (N.S.S.C.)	*Position at termination: Manager, Computer based training* *Length of employment: 2 ½ years* The defendant demoted the plaintiff for failing to meet deadlines which were unreasonable. There was no warning given - the plaintiff was "blind sided" with demotion at a meeting to discuss the deadlines.	The Court held that the plaintiff had been constructively dismissed and awarded 4 months pay in lieu of notice. This period was extended by 2 months to compensate for the defendant's breach of the duty to deal fairly with the plaintiff	$23,833.33 (reasonable notice) $11,916.67 (bad faith)

NOVA SCOTIA			
Case name	Facts	Decision	Award
Day v. Wal-Mart Canada Inc (2000), 188 N.S.R. (2d) 69 (N.S.C.A.)	*Position at termination: Store Manager* *Length of employment: 17 years* The defendant dismissed the plaintiff on the grounds that he altered payroll records to delete overtime, contrary to company policy. The plaintiff acted in response to a direction that no overtime would be permitted. After discovering the alterations, the District Manager suspended the plaintiff, with pay. The plaintiff and his wife were expecting their second child to be born shortly and the plaintiff asked whether he was going to be fired. The District Manager told the plaintiff that he would not recommend termination but then made the decision to terminate the plaintiff's employment.	The jury found that the plaintiff's actions did not justify his dismissal and he was entitled to 17 months pay in lieu of notice. This was extended by 12 months to compensate for the defendant's bad faith conduct in misleading the plaintiff. The Court of Appeal upheld the jury's decision.	$90,950 (reasonable notice) $64,200 (bad faith) $79,970 (bonus)
Musgrave v. Levesque Securities Inc (2000), 183 N.S.R. (2d) 349 (N.S.S.C.)	*Position at termination: Investment Dealer* *Length of employment: 4 years* The defendant dismissed the plaintiff without notice after it merged with another company. The defendant alleged poor performance as the cause of dismissal although it had not told the plaintiff that his performance was of concern. The plaintiff had to remove his personal effects under the supervision of his superior and was not allowed to take his personal documents. The supervisor subsequently defamed the plaintiff to his former clients and gave misleading references to the plaintiff's prospective employers. The defendant also wastefully liquidated the plaintiff's investment, without notice, to satisfy an execution order which the plaintiff was challenging.	The Court held that the defendant did not have cause to dismiss the plaintiff. The Court awarded the plaintiff 8 months pay in lieu of notice and, because of the defendant's "extreme" bad faith at and following termination, extended this by a further 8 months. The Court also awarded the plaintiff damages for defamation.	$59,501 (reasonable notice, bad faith and defamation)

ONTARIO			
Case name	Facts	Decision	Award
Antonacci v. Great Atlantic & Pacific Co. of Canada (1998), 35 C.C.E.L. (2d) 1 (Gen. Div.), (2000), 128 O.A.C. 236 (C.A.)	*Position at termination: Store Manager* *Length of employment: 33 years* The defendant dismissed the plaintiff without cause. After termination, the defendant alleged that the plaintiff had been fired for poor performance, harassment, intimidation and threats made against other employees. This position was abandoned one week before trial. The defendant spread rumours about the plaintiff, making it impossible for him to find a new job.	The Court held that the plaintiff was entitled to 24 months pay in lieu of notice which included compensation for the defendant's bad faith conduct. The Court of Appeal upheld the decision except for the award for aggravated damages, which it overturned.	$26,708.85 (24 months salary less workers compensation benefit received)

ONTARIO			
Case name	Facts	Decision	Award
Haldane v. *Shelbar Enterprises Ltd* (1998), 165 D.L.R. (4th) 355 (Ont. Div. Ct.), (1999), 179 D.L.R. (4th) 716 (C.A.)	*Position at termination: Controller* *Length of employment: 5 years* The plaintiff engaged in inappropriate and insubordinate behaviour at work. At a disciplinary meeting, the defendant told the plaintiff that she would be suspended for three days without pay. The plaintiff said she could not afford that, and suggested that the defendant take away three days of her vacation time instead. The defendant rejected this and dismissed the plaintiff. The defendant intended to fire the plaintiff and selected a form of discipline which he knew she would reject.	The Court held that the plaintiff's conduct did not warrant dismissal and the plaintiff was entitled to 7 months pay in lieu of notice. In arriving at this amount, the Court stated that it considered the plaintiff's "position, length of service and quality of her past performance and the events surrounding her ultimate dismissal."	
Kahn v. *Fibre Glass-Evercoat Co.*, (30 May 2000) Docket #98-CV-143272 (Ont. C.J.)	*Position at termination: International Sales Manager* *Length of employment: 2 years* The plaintiff sold his business to the defendant who then hired the plaintiff to sell and promote its products. The defendant had the plaintiff sign a five-year non-competition contract. The defendant laid the plaintiff off five months later due to poor sales. The defendant mislead the plaintiff as to the nature of his role and also with respect to the prospects for long-term employment. The defendant made it difficult, if not impossible, for the plaintiff to perform his job properly.	The Court held that the plaintiff had been dismissed without cause and awarded him 4 months pay in lieu of notice. This was extended by 5 months to compensate for the non-competition contract and a further 3 months to compensate for the bad faith conduct of the defendant in misleading the plaintiff.	$77,818 (reasonable notice) $12,969 (bad faith)
McNamara v. *Alexander Centre Industries Ltd* (2000), 2 C.C.E.L. (3d) 310 (S.C.J.); (2001), 199 D.L.R. (4th) 717 (C.A.)	*Position at termination: President* *Length of employment: 24 years* The plaintiff took a medical leave due to stress. The defendant wilfully misinterpreted the doctor's letter to mean that the plaintiff would never come back to work and sent a letter acknowledging the termination of the plaintiff's employment. The plaintiff immediately advised the defendant he intended to return to work within two weeks. The defendant did not respond.	The Court held that the plaintiff had been dismissed without cause or notice. The reasonable notice period was held to be 24 months, extended by 2 months to compensate for the bad faith conduct of the defendant The decision was affirmed by the Court of Appeal.	$350,923.92 (reasonable notice) $29,243.66 (bad faith)

ONTARIO			
Case name	Facts	Decision	Award
Pioro v. Calian Technology Services Ltd (2000), 48 O.R (3d) 275 (S.C.J.)	*Position at termination: Manager of Manufacturing* *Length of employment: 19 years* The defendant dismissed the plaintiff when it eliminated his department. At termination, the plaintiff's title was *Manager Manufacturing*; however, the defendant attempted to classify the plaintiff as a production supervisor (a lower level position) in order to limit its liability for severance pay. The defendant did not give the plaintiff a reference letter as it promised and told prospective employers that the plaintiff had been a production supervisor, affecting his ability to obtain comparable employment.	The Court held that the plaintiff was entitled to 22 months pay in lieu of notice taking into consideration the length of the plaintiff's service and the defendant's bad faith conduct at termination.	$85,997.84 (reasonable notice and bad faith)
Prinzo v. Baycrest Centre for Geriatric Care, (6 March 2000) 49374/98 (Ont. S.C.J.)	*Position at termination: Manager* *Length of employment: 17 years* The plaintiff was dismissed ostensibly due to cutbacks. The dismissal was preceded by harassment by her supervisor, who constantly called the plaintiff while on sick leave and accused her of malingering. Management also suggested that the plaintiff was somehow harming the residents.	The Court held that the plaintiff was dismissed without cause and awarded 18 months pay in lieu of notice. The Court further held that, while bad faith conduct allowed it to extend the notice period, certain acts of harassment were so extreme and insensitive that they comprised a separate cause of action. The Court held that the plaintiff was entitled to aggravated damages for harassment and punitive damages for the defendant's egregious treatment.	$45,750 (reasonable notice) $15,000 (aggravated damages) $5,000 (punitive damages)
Buranowski v. Binks Manufacturing Co. (2000), 49 C.C.E.L. (2d) 170 (S.C.J.)	*Position at termination: President* *Length of employment: 29 years* The plaintiff was summarily dismissed shortly after the President and CEO of Binks U.S. (the plaintiff's mentor) was fired. He was informed of his dismissal by a taxi driver who delivered a note to his home on the night of his son's graduation. In its defence, Binks vigorously pursued unfounded allegations of fraud, theft, negligent performance of duty and breach of fiduciary duty.	The Court held that the plaintiff was wrongfully dismissed and awarded him 30 months pay in lieu of notice. This was extended by 6 months to compensate for the defendant's bad faith in the manner of dismissal and the unfounded allegations of misconduct.	
Hanley v. Ortech Corp. (1999), 47 C.C.E.L. (2d) 241 (S.C.J.)	*Position at termination: Director of the Ontario Waste Exchange* *Term of employment: 18 years* The plaintiff was dismissed when government cut funding to her program. The defendant sold the program and negotiated an 18-month contract for the plaintiff with the new company. The plaintiff did not accept the new position on the basis that it was not comparable to her previous position.	The Court held that the plaintiff was dismissed without cause and was entitled to 12 ½ months pay in lieu of notice. The Court found that the defendant's negotiation was intended to limit its liability for severance pay. The Court did not consider this to be bad faith but did take into account the defendant's "unfair and insensitive" treatment of the plaintiff when determining the length of notice.	$40,037.** (reasonable notice)

ONTARIO			
Case name	Facts	Decision	Award
Kissner v. *Goodall & Hills* (1999), 102 O.T.C. 210 (Ont. S.C.J.)	*Position at termination: Legal Assistant* *Term of employment: 21 years* The plaintiff was dismissed for poor performance. The plaintiff made unauthorized phone calls, left work early, and did little while at work; however, this behaviour had been condoned by the previous owner for years. The defendants prepared a warning letter; however, the plaintiff refused to meet to discuss it. The defendant dismissed the plaintiff three days later. The defendants then pursued criminal charges against the plaintiff for misuse of the telephone, which charges were eventually stayed.	The Court held that, while the plaintiff had her shortcomings, her behaviour did not warrant dismissal and had been condoned by the previous owner for years. The Court also held that the plaintiff's refusal to discuss the warning letter did not justify her abrupt termination. The plaintiff was entitled to 12 months notice, extended by 3 months for the harsh manner of her dismissal	$39,780 (reasonable notice) $9,945 (bad faith)
Ben David v. *Congregation B'nai Israel* (1999), 44 C.C.E.L. (2d) 302 (O.C.J., Gen. Div.)	*Position at termination: Rabbi, teacher and cantor* *Length of employment: 26 years* The plaintiff signed a number of employment agreements over the years but was unaware of the contents. The defendant led the plaintiff to believe that the contract terms would not be relied upon and that the plaintiff was an employee for an indefinite term. In the most recent contract, the defendant unilaterally added a fixed term and provision for notice of renewal or non-renewal but did not draw these terms to the plaintiff's attention. The defendant notified the plaintiff that it did not intend to renew his contract. The plaintiff's wife was also fired and their family ostracized in the synagogue.	The Court held that the most recent employment contract was not enforceable. The Court further held that there was no cause for the dismissal and that the defendant acted in bad faith in relying on the contractual provisions after representing to the plaintiff that the contracts were unimportant documents. The Court held that the plaintiff was entitled to 30 months pay in lieu of notice and also awarded punitive damages for the defendant's "cruel, abusive, insolent, hurtful and malicious" conduct. (The Court did not have the jurisdiction to extend the notice period.)	$110,000 (reasonable notice) $20,000 (punitive damages)
Skoptiz v. *Intercorp Excelle Foods Inc.* (1999), 43 C.C.E.L. (2d) 253 (O.C.J., Gen. Div.)	*Position at termination: Promotions Manager* *Length of employment: 11 years* The plaintiff was on sick leave for 15 months during which time her work was performed by three part-time workers. The plaintiff asked to return to work on a part-time basis with a view to returning to full-time work. The defendant refused to accommodate the request but told the plaintiff her full time job was open to her.	The Court held that the defendant constructively dismissed the plaintiff when it failed to accommodate her request for part-time work. The Court found that accommodating the plaintiff would not have caused the defendant undue hardship and failing to do so was a breach of human rights legislation. The Court awarded the plaintiff 10 months pay in lieu of notice which was extended by a further 2 months to compensate for the defendant's bad faith conduct (acting in a way that was indifferent to the plaintiff's vulnerable position).	$34,580 (reasonable notice) $6,916 (bad faith)

ONTARIO			
Case name	Facts	Decision	Award
Simpson v Consumer's Association of Canada (1999), 41 C.C.E.L. (2d) 179 (Gen. Div.)	*Position at termination* Executive Director *Length of employment* 5 years The defendant met with the plaintiff to discuss allegations of sexual harassment and inappropriate conduct. Following the meeting, the defendant offered the plaintiff a contract renewal on terms that were less favourable than his current contract. The plaintiff formally advised the defendant that he considered this a constructive dismissal and gave 12 months notice of his intention to leave. Upon receiving further allegations of inappropriate conduct, none of which were properly investigated, the defendant terminated the plaintiff's employment for cause. The defendant leaked to the press that the plaintiff was fired for sexual harassment and poor performance.	The Court held that the defendant constructively dismissed the plaintiff in its contract renewal proposal and then dismissed the plaintiff without cause. The Court awarded the plaintiff 12 months pay in lieu of reasonable notice which was extended by 6 months to compensate for the defendant's bad faith conduct leading up to and after termination. (The defendant's in-house legal counsel, who ultimately replaced the plaintiff, was held jointly and severally liable for her role in misadvising the defendant and interfering in the plaintiff's employment contract.)	$147,280 (reasonable notice and bad faith) $20,000 (bonus) $136,620 (allowances, management fees, vacation pay)
Estrada v Lesperance (1998), 39 C.C.E.L. (2d) 226 (Ont. C.J. Gen. Div.)	*Position at termination* Legal Secretary and paralegal *Length of employment* 4 years The defendant, an immigration lawyer, and the plaintiff, his paralegal, worked from their respective homes and communicated by electronic means. The plaintiff had a high degree of decision-making power. The defendant dismissed the plaintiff for performing work for clients without his knowledge. The defendant mistakenly assumed that the plaintiff was setting up her own business and trying to steal his clients. In fact, the plaintiff was assisting the defendant's clients who either could not afford the fee or were in need of immediate attention. The defendant obtained an *Anton Piller* order, without notice to the plaintiff, and arrived at her home with a sheriff to remove client files, office equipment and credit cards. During the seizure, the defendant fired the plaintiff. The defendant maintained the allegations of breach of trust until trial even though he knew that they were unfounded.	The Court held that the plaintiff had been wrongfully dismissed and was entitled to 4 months pay in lieu of notice. This was extended by 3 months to compensate for the defendant's bad faith in maintaining unfounded allegations.	
Budd v. Bath Creations, (18 September 1998), Toronto 96-CL-969"1 (Ont. C.J.)	*Position at termination* Chartered Accountant and Business Manager *Length of employment* 8 years The plaintiff sold his company to the defendant who intimated that the plaintiff would have a position in the new company. On that basis, the plaintiff signed a two-year non-competition agreement as a condition of the sale. Soon after the sale, the defendant terminated the plaintiff's employment.	The Court held that the plaintiff was entitled to 10 months pay in lieu of notice. This was extended by 3 months because of the non-competition agreement which affected the plaintiff's ability to find a new job. The Court added a further 3 months to compensate for the defendant's bad faith (misleading the plaintiff about his future employment).	

ONTARIO			
Case name	Facts	Decision	Award
Kroll v. 949486 Ontario Inc. (1997), 34 C.C.E.L. (2d) 78 (Gen. Div.)	*Position at termination: Restaurant Manager* *Length of employment: 6 years* The defendant fired the plaintiff without warning or cause, one month before his wedding. At the time of termination, the defendant had the plaintiff sign a termination agreement which included a restrictive covenant affecting his ability to seek a similar job. The defendant told the plaintiff that he would be fired for "wilful misconduct" if he did not sign the agreement (meaning he would not get any severance). The defendant did not allow the plaintiff time to consider the agreement or seek independent legal advice.	The Court held that the termination agreement was not enforceable and the defendant acted in bad faith in the manner of dismissal. Accordingly, the plaintiff was entitled to 6 months pay in lieu of notice.	$11,668.70 (reasonable notice and bad faith)
Chaddock v. Great Lakes Truck Centre Ltd (1998), 34 C.C.E.L. (2d) 195 (Ont. C.J. Gen. Div.)	*Position at termination: Credit Manager* *Term of employment: 16 years* The defendant fired the plaintiff with 5 ½ months pay in lieu of notice. The plaintiff sued and, in its statement of defence, the defendant alleged that the plaintiff was dismissed for insubordination, rudeness and disruptive conduct. These allegations were withdrawn shortly before trial.	The Court held that the plaintiff was entitled to 12 months pay in lieu of notice, which included compensation for the defendant's bad faith in making unfounded allegations.	
Nagy v. Metropolitan Toronto Convention Centre Corp (1998), 35 C.C.E.L. (2d) 209 (Ont. J.C. Gen. Div.)	*Position at termination: Assistant Banquet Manager* *Length of employment: 12 years* The defendant dismissed the plaintiff for improperly allocating gratuities to himself. The plaintiff thought that this was an acceptable way of compensating for lost gratuities when he covered for the Banquet Manager. The plaintiff did not hide this practice and the amount was small.	The Court held that the plaintiff's conduct did not justify his dismissal. The plaintiff was entitled to 15 months pay in lieu of notice, extended by 1 month to compensate for the manner of dismissal.	$84,789.30 (reasonable notice) $5,652.62 (bad faith)
Galbraith v. Acres International Ltd. (2001), 8 C.C.E.L. (3d) 66 (Ont. S.C.J.)	*Position at termination: Senior Financial Officer* *Length of employment: 9 years* The defendant changed the plaintiff's duties and remuneration because of his age (54). Approximately 90% of the plaintiff's duties were transferred to a younger employee.	The Court held that the plaintiff was constructively dismissed and entitled to 15 months pay in lieu of notice. This was extended by 3 months due to the defendant's bad faith in changing the plaintiff's duties due to his age.	

ONTARIO			
Case name	Facts	Decision	Award
Zesta Engineering Ltd v. Cloutier (2001), 7 C.C.E.L. (3d) 53 (S.C.J.)	*Position at termination* Vice President and Assistant General Manager *Length of employment* 21 years The plaintiff (employer) sued the defendant (employee) seeking an injunction. The defendant counterclaimed for damages for wrongful dismissal. The plaintiff's sole shareholder (Eastman) was the defendant's father-in-law. After the breakup of the defendant's marriage, his relationship with Eastman became tense and there was little communication or trust between them. Eastman discovered documents indicating that defendant was setting up a competing business and he fired the defendant. In fact, the defendant had created the documents in order to trap another employee whom he suspected was going to leave and set up a competing company.	The Court dismissed the plaintiff's action for an injunction and allowed the action for wrongful dismissal. The Court held that the plaintiff did not have just cause to dismiss the defendant and awarded him 21 months pay in lieu of notice and a further 3 months to compensate for the plaintiff's bad faith conduct at termination.	
Baughn v. Officerski (2001), 5 C.C.E.L. (3d) 283 (S.C.J.)	*Position at termination* Secretary *Length of employment* 10 years The defendant terminated the plaintiff's employment as he suspected that she was stealing money. The defendant did not conduct a thorough investigation. At a meeting to discuss financial discrepancies, the defendant accused the plaintiff of theft. The plaintiff was so upset she did not return to work and the defendant fired her.	The Court held that the plaintiff was wrongfully dismissed, as there was not enough evidence to establish that she was stealing. The Court awarded the plaintiff 7 months pay in lieu of notice and added 5 months for the defendant's bad faith conduct.	

PRINCE EDWARD ISLAND			
Case name	Facts	Decision	Award
Alexander v. Padinox Inc (1999), 175 Nfld & P.E.I.R. 58 (P.E.I.S.C. - T.D.); (1999), 181 Nfld & P.E.I.R. 317 (P.E.I.S.C. - A.D.)	*Position at termination* Production Supervisor *Length of employment* 8 months The plaintiff was hired subject to a one-year probationary period. After approximately six months, the defendant "lost confidence" in the plaintiff but did not tell him of its concerns even when the plaintiff inquired as to how he was doing. Two weeks later, the defendant dismissed the plaintiff.	The Court held that the defendant wrongfully dismissed the plaintiff. The power to dismiss a probationary employee is not absolute, the employer must exercise its discretion reasonably. The Court held that the plaintiff was entitled to 5 months pay in lieu of notice, taking into account the bad faith of the defendant in failing to properly evaluate the plaintiff's performance or to provide him with reasonable notice.	

QUÉBEC			
Case name	Facts	Decision	Award
Duffield v. *Alubec Industries Inc.*, (31 March 1998), Montréal 500-05-001475-951 (Sup. Ct.)	*Position at termination: CEO* *Length of employment: 11 days* While touring the defendant's facilities and meeting customers, the plaintiff made comments about the defendant's use of technology which offended the defendant. The defendant dismissed the plaintiff on the grounds that he was overqualified. The defendant took the position that it had cause for dismissal as the plaintiff was arrogant and exercised poor judgment.	The Court held that the plaintiff's conduct did not justify his dismissal and awarded him 24 weeks pay in lieu of notice. The Court also awarded "moral damages" of $8,000 to compensate for the defendant's bad faith conduct.	$36,923.04 (reasonable notice) $8,000 (bad faith)
Forgione v. *Amex Canada Inc.*, (10 March 1999), Montréal 500-05-022032-963 (Sup. Ct.)	*Position at termination: Travel Consultant* *Length of employment: 14 years* The plaintiff was dismissed after three years of poor performance. Prior to dismissal, the plaintiff was under strict supervision, which was so stressful that the plaintiff went on sick leave. On the day the plaintiff returned to work, she was taken aside and informed of the termination of her employment. The plaintiff was not allowed to return to her desk and a consultant, who was unknown to the plaintiff, explained what was happening while escorting her out of the building.	The Court held that the plaintiff had been terminated for cause but the manner of her dismissal was such that moral damages were in order.	$5,000 (bad faith)
Del Duca v. *Arcon Canada*, (5 February 1998), Montréal 500-05-011684-956 (Sup. Ct.)	*Position at termination: Area Sales Manager* *Length of employment: 6 months* The defendant lured the plaintiff away from secure employment. Several factors, unrelated to the plaintiff's performance, resulted in a drop in sales during his tenure. The plaintiff was summarily dismissed.	The Court held that the plaintiff had been wrongfully dismissed and awarded him 1 year's pay in lieu of notice. This award took into account the abrupt manner of dismissal, low severance offer and humiliation of the plaintiff.	$26,000 (reasonable notice and bad faith)

SASKATCHEWAN			
Case name	Facts	Decision	Award
Zimmerman v. *Kindersley Transport Ltd.*, (5 May 1998), Saskatoon SC No. 588 [1997] (Prov. Ct.)	*Position at termination: Clerical worker* *Length of employment: 2 years* The plaintiff was abruptly fired without cause, notice, or explanation. The defendant hovered over the plaintiff while she gathered her things from her desk. The defendant continued to allege incompetence as the reason for dismissal until the beginning of the trial.	The Court held that the plaintiff was wrongfully dismissed and she was entitled to 4 weeks pay in lieu of notice. This was extended by 4 weeks to compensate for the bad faith manner in which she was dismissed.	$1,500 (reasonable notice) $1,500 (bad faith)

SASKATCHEWAN			
Case name:	Facts	Decision	Award
McGeady v. Saskatchewan Wheat Pool (1998), 174 Sask. R. 110 (Q.B.); (1999), 180 Sask. R. 309 (C.A.)	*Position at termination: Manager* *Length of employment: 19 years* The plaintiff was dismissed and did not accept the severance offered (12 months).	The Court held that the plaintiff was entitled to 14 months extended by 6 months for the defendant's bad faith conduct. The Court of Appeal reduced the extension to 1 month as it found the defendant's conduct to be on the "borderline" of bad faith.	$82,981 (reasonable notice) $5,927 (bad faith) $2,907 (bonus)

APPENDIX B

AWARDS MADE FOR BAD FAITH DISMISSAL PURSUANT TO *WALLACE* v. *UNITED GRAIN GROWERS*

This list includes only cases in which the judge added a discrete extended notice period for bad faith. List is current to June 30th, 2001

Case name	Years of service	Normal notice	Increase	Value of extended notice period
Muchell v. *Westburne Supply Alberta* (2000), 260 A.R. 38 (Q.B.)	28 years, 9 months	24 months $160,000	3 months	$20,00
Beadall v. *Chevron Canada Resources Ltd* (1999), 243 A.R. 72 (Q.B.)	7 ½ years	7 ½ months $37,500	1 ½ months	$7,500
Frank v. *Federated Cooperatives Ltd* (1998), 211 A.R. 288 (Q.B.)	22 years	15 months $55,485	5 months	$18,495
Chan v. *Meyer's Sheet Metal Ltd.*, 1998 ABPC 144	4 years	5 weeks $2,250		
D.M.D v. *Artesian Realty and Insurance (G.P.) Ltd.*, 2001 ABPC 86	5 months	2 weeks $900	6 weeks	$2,700
Hamer-Jackson v. *McCall Pontiac Buick Ltd* (1998), 38 C.C.E.L. (2d) 189 (B.C.S.C.); (2000), 77 B.C.L.R. (3d) 214 (B.C.C.A.)	13 years	13 months $140,365	6 months	$64,784
Cassady v. *Wyeth-Ayerst Canada Inc* (1998), 163 D.L.R. (4th) 1 (B.C.C.A.)	10 weeks	8.33 months $30,933.30	3 months	$10,000
S.S v. *Port Alberni Friendship Center*, 2000 BCSC 106	5 years	7 months $21,756	6 months	$18,648
Rowbotham v. *Addison*, 2000 BCSC 218	18 years	3 months $6,300	1 month	$2,100
Robinson v. *Fraser Wharves Ltd.*, 2000 BCSC 199	9 years	15 months $73,850	3 months	$14,770
Smart v. *McCall Pontiac Buick Ltd.*, (7 September 1999), Kamloops 22360 (B.C.S.C.)	13 years	18 months $225,000	6 months	$75,000
Stafford v. *British Columbia Chicken Marketing Board*, (27 November 1998), Vancouver C983507 (B.C.S.C.)	30 years	24 months $204,570.08	2 weeks	$4,470

Case name	Years of service	Normal notice	Increase	Value of extended notice period
Horvath v. Nanaimo Credit Union, (15 July 1998), Nanaimo S16202 (B.C.S.C.)	13 years	12 months $40,000	4 months	$13,333
Martin v. International Maple Leaf Springs Water Corp (1998), 38 C.C.E.L. (2d) 128 (B.C.S.C.)	9 months	6 months $24,000	3 months	$12,000
Birch v. Grinnell Fire Protection a division of Tyco International of Canada, (2 July 1998), Vancouver C970973 (B.C.S.C.)	19 years	16 months $69,885	2 months	$7,765
Stolle v. Daishinpan (Canada) Inc (1998), 37 C.C.E.L. (2d) 18 (B.C.S.C.)	6 years	5 months $14,000	3 months	$8,400
Boule v. Ericatel Ltd., (8 June 1998), Vancouver C965620 (B.C.S.C.)	13 years	14 months $86,800	4 months	$24,800
Richardson v. AIC Ltd., (30 August 1999), Vancouver 98-47617 (B.C.P.C.)	11 months	1 month $2,625	1 month	$2,625
Robertson v. Red Robin Restaurants of Canada Ltd., (27 February 1998), Vancouver 99-29769 (B.C.P.C.)	5 years	15 weeks $6,058	2 months	$5,000
McKinley v. B.C. Tel (1999), 67 B.C.L.R. (3d) 337 (B.C.C.A.); (2001), 200 D.L.R. (4th) 358 (S.C.C.)	17 years	22 months $92,055.60	4 months	$16,737.40
Whiting v. Winnipeg River Brokenhead Community Future Development Corp (1997), 116 Man. R. (2d) 89 (Q.B.); (1998), 159 D.L.R. (4th) 18 (C.A.)	5 years	6 months $21,000	6 months	$21,092.88
Mrozowich v. Grandview Hospital District #38 (1998), 125 Man R. (2d) 259 (Q.B.)	3 years	5-7 months $11,250-$15,764	1-3 months (total notice was 8 months)	$2,252-$6,756
Hampton v. Thirty-Five Charlotte Ltd (1999), 48 C.C.E.L. (2d) 96 (Q.B.)	8 ½ years	8 ½ months $14,280	2 ½ months	$4,200
Squires v. Corner Brook Pulp and Paper Ltd (1994) 122 Nfld. & P.E.I.R. 91 (Nfld. S.C. T.D.); (1999), 175 Nfld. & P.E.I.R. 202 (Nfld C.A.)	23 years	18 months $116,370	6 months	$38,790
Anderson v. Tesculi Eduplus Inc (1999), 179 N.S.R. (2d) 284 (N.S.S.C.)	2 years	4 months $17,600	2 months	$8,800
Day v. Wal-Mart Canada Inc (2000), 188 N.S.R. (2d) 69 (N.S.C.A.)	17 years	17 months $90,956	12 months	$64,200
Musgrave v. Levesque Securities Inc (2000), 183 N.S.R. (2d) 349 (N.S.S.C.)	4 years	8 months $26,366	8 months	$26,366

Case name	Years of service	Normal notice	Increase	Value of extended notice period
Antonacci v. *Great Atlantic & Pacific Co. of Canada* (1998), 35 C.C.E.L. (2d) 1 (Gen. Div.); (2000), 128 O.A.C. 236 (C.A.)	33 years	18-20 months $70,200-$78,000	4-6 months (total of 24 months notice)	$15,600-$23,400
Kahn v. *Fibre Glass-Evercoat Co.*, (30 May 2000) Docket #98-CV-143272 (Ont. C.J.)	2 years	9 months $77,818	3 months	$12,969
McNamara v. *Alexander Centre Industries Ltd.* (2000), 2 C.C.E.L. (3d) 310 (S.C.J.); (2001), 199 D.L.R. (4th) 717 (C.A.)	24 years	24 months $350,924	2 months	$29,244
Baranowski v. *Binks Manufacturing Co.* (2000), 49 C.C.E.L. (2d) 170 (S.C.J.)	29 years	30 months $342,370	6 months	$68,474
Kissner v. *Goodall & Hills* (1999), 102 O.T.C. 210 (Ont. S.C.J.)	21 years	12 months $49,725	3 months	$9,945
Skopitz v. *Intercorp Excelle Foods Inc.* (1999), 43 C.C.E.L. (2d) 253 (O.C.J., Gen. Div.)	11 years	10 months $34,580	2 months	$6,916
Simpson v. *Consumer's Association of Canada* (1999), 41 C.C.E.L. (2d) 179 (Gen. Div.)	5 years	12 months $98,187	6 months	$49,093
Estrada v. *Lesperance* (1998), 39 C.C.E.L. (2d) 226 (Ont. C.J. Gen. Div.)	4 years	4 months $12,312	3 months	$9,234
Budd v. *Bath Creations*, (18 September 1998), Toronto 96-CU-96971 (Ont. C.J.)	8 years	13 months $83,333	3 months	$24,999
Nagy v. *Metropolitan Toronto Convention Centre Corp.* (1998), 35 C.C.E.L. (2d) 209 (Ont. J.C. Gen. Div.)	12 years	15 months $84,739	1 month	$5,653
Duffield v. *Alubec Industries Inc.*, (31 March 1998), Montréal 500-05-001475-95 (Sup. Ct.)	11 days	6 months $36,923	Moral damages awarded in a lump sum	$8,000
Zimmerman v. *Kindersley Transport Ltd.*, (5 May 1998), Saskatoon SC 588 [1997] (Prov. Ct.)	2.75 years	4 weeks $1,500	4 weeks	$1,500
McGeady v. *Saskatchewan Wheat Pool* (1998), 174 Sask. R. 110 (Q.B.); (1999), 180 Sask. R. 309 (C.A.)	19 years	14 months $82,981	1 month	$5,927

APPENDIX C

CANADA LABOUR CODE

PART III, DIVISION XIV
UNJUST DISMISSAL

Complaint to inspector for unjust dismissal
240. (1) Subject to subsections (2) and 242(3.1), any person
(*a*) who has completed twelve consecutive months of continuous employment by an employer, and
(*b*) who is not a member of a group of employees subject to a collective agreement,
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Time for making complaint
(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

Extension of time
(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.
R.S., 1985, c. L-2, s. 240; R.S., 1985, c. 9 (1st Supp.), s. 15.

Reasons for dismissal
241. (1) Where an employer dismisses a person described in subsection 240(1), the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

Inspector to assist parties
(2) On receipt of a complaint made under subsection 240(1), an inspector shall endeavour to assist the parties to the complaint to settle the complaint or cause another inspector to do so.

Where complaint not settled within reasonable time
(3) Where a complaint is not settled under subsection (2) within such period as the inspector endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the inspector shall, on the written request of the person who made the complaint

that the complaint be referred to an adjudicator under subsection 242(1),
(*a*) report to the Minister that the endeavour to assist the parties to settle the complaint has not succeeded; and
(*b*) deliver to the Minister the complaint made under subsection 240(1), any written statement giving the reasons for the dismissal provided pursuant to subsection (1) and any other statements or documents the inspector has that relate to the complaint.
1977-78, c. 27, s. 21.

Reference to adjudicator
242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).
Powers of adjudicator
(2) An adjudicator to whom a complaint has been referred under subsection (1)
(*a*) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;
(*b*) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and
(*c*) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(*a*), (*b*) and (*c*).

Decision of adjudicator
(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall
(*a*) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
(*b*) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Limitation on complaints
(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where
(*a*) that person has been laid off because of lack of work or because of the discontinuance of a function; or
(*b*) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Where unjust dismissal
(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

(*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
(*b*) reinstate the person in his employ; and
(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.
R.S., 1985, c. L-2, s. 242; R.S., 1985, c. 9 (1st Supp.), s. 16; 1998, c. 26, s. 58.

Decisions not to be reviewed by court
243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.

No review by *certiorari*, etc.
(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.
1977-78, c. 27, s. 21.

Enforcement of orders
244. (1) Any person affected by an order of an adjudicator under subsection 242(4), or the Minister on the request of any such person, may, after fourteen days from the date on which the order is made, or from the date provided in it for compliance, whichever is the later date, file in the Federal Court a copy of the order, exclusive of the reasons therefor.

Idem
(2) On filing in the Federal Court under subsection (1), an order of an adjudicator shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order were a judgment obtained in that Court.
R.S., 1985, c. L-2, s. 244; 1993, c. 42, s. 34(F).

Regulations
245. The Governor in Council may make regulations for the purposes of this Division defining the absences from employment that shall be deemed not to have interrupted continuity of employment.
1980-81-82-83, c. 47, s. 27.

Civil remedy
246. (1) No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245.

Application of section 189
(2) Section 189 applies for the purposes of this Division.
1977-78, c. 27, s. 21.

REPORT ON GOOD FAITH AND THE INDIVIDUAL CONTRACT OF EMPLOYMENT

EXECUTIVE SUMMARY

A. INTRODUCTION

The Manitoba Law Reform Commission has conducted a comprehensive review of the common law relating to bad faith dismissal following the decision of the Supreme Court of Canada in *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (hereinafter referred to as *Wallace)*.

The Commission is concerned with the remedy for bad faith dismissal created in *Wallace*. In the opinion of the Commission, the remedy proposed by the minority in *Wallace* presents a much more rational development of the common law of employment.

Employees under fixed term contracts may only be dismissed for cause; that is, a fundamental breach of the contract. Employees under indeterminate contracts of employment, however, may, in addition, be dismissed for any reason as long as the employer gives reasonable notice or equivalent salary in lieu thereof. The obligation to give notice is an implied term of the employment contract, the breach of which may give rise to an action for damages for wrongful dismissal.

In both fixed and indeterminate term contracts the dismissal process may be complicated by the employer's failure to handle it in an honest, forthright and sensitive manner. This is called *bad faith dismissal* and it adds significantly to the trauma and stress of losing one's job. The bad faith does not relate to the *reasons* for dismissal but rather to the *manner* of dismissal.

B. THE LAW OF BAD FAITH DISMISSAL IN MANITOBA

Prior to *Wallace*, Canadian courts struggled with the appropriate legal response to claims for bad faith dismissal. Traditionally, an employee was entitled to compensatory damages for the failure to give reasonable notice but there was no remedy for non-pecuniary loss (such as mental distress or loss of reputation) flowing from bad faith conduct unless that conduct was sufficient to establish a cause of action on its own (for example, defamation).

Despite this "rule", Canadian courts found a number of ways to compensate employees and/or punish employers for bad faith. This resulted in an inconsistent body of case law. In *Wallace*, the Supreme Court sought to address the uncertainty and unpredictability in the law and strike a balance between protecting employees from bad faith conduct and maintaining employers' freedom to manage their workforce.

The Supreme Court affirmed the employer's right to dismiss an employee for any reason as long as reasonable notice is given, but went on to say that the employer must exercise the power to dismiss in good faith. This means that the employer must act in a *candid, reasonable, honest and forthright* manner and should refrain from conduct which is *unfair, misleading and unduly insensitive*. The Court's remedy was to extend the period of reasonable notice beyond that which would have been awarded in the absence of bad faith conduct.

Justice McLachlin (as she then was), speaking for the minority in *Wallace*, disagreed with the majority's remedy, preferring to treat the obligation to act in good faith at termination as an implied term of the employment contract, the breach of which gives rise to an action for damages. The amount of damages should then be based upon the actual loss suffered by the employee as a result of the conduct.

The duty to act in good faith articulated in *Wallace* has been well received but the remedy of extended notice has been criticized on a number of grounds. The purpose of *reasonable notice* is to give the dismissed employee financial support while they find new work. The amount of notice will depend on factors related to the employee's ability to find new work and bears little relation to any loss suffered due to bad faith conduct.

As the remedy does not address the extent of employees' actual loss, it may under-compensate or over-compensate them. The employees' monthly income is not an appropriate benchmark to compensate bad faith dismissal because neither their loss nor the need for deterrence is related to their level of income. Furthermore, high earners will receive more compensation than low earners, regardless of whether they suffer greater loss.

C. OPTIONS FOR REFORM AND RECOMMENDATIONS

The Commission accepts, as a starting principle, that the employment relationship plays a vital role in the health and wellbeing of employees, employers and society as a whole. The Commission acknowledges that employers need freedom to manage their workplace in order to compete but also recognizes the inherent imbalance of power in favour of employers and the fact that an employer's bad faith conduct may have serious negative consequences for employees.

The ten recommendations contained in the report are premised on the Commission's belief that the law should reflect the standards of conduct of responsible, reasonable and fair employers and the reasonable expectations of honest employees.

In arriving at its recommendations, the Commission considered the power of employers to dismiss employees without good reason and the employer's conduct in the performance and termination of the employment contract.

Restricting or removing the right to dismiss for any reason would significantly increase the protection of employees' rights but may have a serious impact on employers' ability to manage their workforce and ability to compete in a global economy. The Commission did not have sufficient information and expert analysis to determine the consequences of such a radical change in the law. Accordingly, the Commission does not recommend any change in the traditional power of employers under indeterminate contracts of employment to dismiss employees for any reason, subject to reasonable notice or equivalent salary in lieu thereof and subject to good faith conduct in the termination process. (Recommendation 1)

In considering the employer's conduct in the performance and termination of the employment contract, the Commission prefers the opinion of the minority in *Wallace* who considered the obligation to act in good faith in the termination of an individual contract of employment to be an implied term of that contract. A breach of the implied term would give rise to a cause of action for damages to be determined by the actual loss suffered by the employee.

The Commission would go further by extending the scope of the duty to include good faith in the *performance* of the employment contract as well as in the *termination* of it. Employees are inherently vulnerable to the bad faith conduct of their employer throughout the contract, not just at termination. It may be that more harm is caused by bad faith conduct during performance of the contract than at termination. Restricting the scope of the duty does not make sense if the purpose of the duty is to protect employees from harm.

The concept of a broader duty of good faith in the employment context is increasingly recognized both at common law (for example in constructive dismissal law) and in legislation (*The Labour Relations Act* and *The Human Rights Code)*. The concept of an implied term of good faith in the employment contract is therefore consistent with previous authorities and would facilitate a rational and consistent development of employment law. It enhances certainty and predictability.

An obligation to act in good faith will not significantly interfere with the efficiency concerns of employers but will offer significant protection to employees. Furthermore, it will reduce the disparity in treatment between non-unionized workers and unionized workers who are protected from bad faith conduct by a legislatively implied term in each collective agreement in Manitoba.

For these reasons, the Commission recommends that individual contracts of employment be subject to an implied term that the employer act in good faith in both the performance and termination of the contract. (Recommendations 2 and 6)

The duty to act in good faith should apply to both indefinite and fixed term contracts. Furthermore, there is no circumstance in which bad faith conduct should be permitted and, accordingly, the Commission recommends that the obligation to act in good faith apply notwithstanding any agreement to the contrary. In other words, employers and employees should not be able to "contract out" of the obligation of good faith. (Recommendations 3 and 7)

In considering the remedies available for breach of the implied term, the Commission is of the opinion that any remedy should recognize the employee's full loss, including both pecuniary and non-pecuniary loss. Punitive damages should also be available to punish particularly egregious conduct and to act as a deterrent. Accordingly, the Commission recommends that remedies for bad faith conduct should include compensatory, aggravated and punitive damages. (Recommendations 4 and 8)

The Commission also considered whether to ground the obligation to act in good faith in tort law rather than contract law. Tort law has more flexible remedies. However, the employment contract is the primary repository of the rights and duties of employers and it would be preferable to develop the obligation in a way consistent with other obligations. The Commission therefore does not recommend creation of a tort of bad faith dismissal. (Recommendation 5) This does not mean that employees should be limited to an action for breach of contract and the Commission recommends that they be entitled to pursue and any all remedies which they may have at law including: an action for breach of contract, an action in tort or a complaint to the Manitoba Human Rights Commission (Recommendation 9).

The common law changes very slowly and the Supreme Court is unlikely to revisit this issue in the near future. Therefore, the Commission suggests that its recommendations be incorporated into new legislation, which might be called *The Employment Contracts Act*. (Recommendation 10)

RÉSUMÉ DU RAPPORT SUR LA BONNE FOI ET CONTRAT DE TRAVAIL INDIVIDUEL

RÉSUMÉ

A. INTRODUCTION

Par suite de la décision de la Cour suprême du Canada dans *Wallace c. United Grain Growers Ltd.*, [1997] 3.R.C.S. 701 (ci-après appelée l'« *affaire Wallace* »), la Commission de réforme du droit du Manitoba (ci-après appelée la « Commission ») a fait une étude en profondeur de la common law se rapportant au renvoi de mauvaise foi.

La Commission a certaines réserves quant à la réparation pour renvoi de mauvaise foi que crée l'*affaire Wallace*. À son avis, la réparation que propose la minorité dans cette affaire présente une élaboration beaucoup plus rationnelle de la common law du travail.

Les employés engagés en vertu d'un contrat de durée fixe ne peuvent être congédiés que pour un motif déterminé, c'est-à-dire que pour contravention essentielle au contrat. Par contre, les employés engagés en vertu d'un contrat de durée indéterminée peuvent être congédiés pour n'importe quel motif, pour autant que l'employeur donne un préavis raisonnable de cessation d'emploi ou verse un salaire tenant lieu de préavis. L'obligation de donner un préavis fait partie des conditions implicites du contrat de travail dont le non-respect peut donner naissance à une action en dommages-intérêts pour congédiement injustifié.

Qu'il s'agisse d'un contrat de durée fixe ou d'un contrat de durée indéterminée, le manque d'honnêteté, de sincérité et de sensibilité de l'employeur peut compliquer le congédiement. Cette façon de faire, qu'il est convenu d'appeler *renvoi de mauvaise foi*, ajoute considérablement au traumatisme et au stress inhérents à la perte de son emploi. L'expression « mauvaise foi » qualifie non pas les *motifs* du congédiement mais plutôt la *manière* dont il est fait.

B. LE DROIT RELATIF AU RENVOI DE MAUVAISE FOI AU MANITOBA

Avant l'*affaire Wallace*, les tribunaux canadiens se démenaient pour trouver une solution juridique appropriée aux demandes de réparation pour congédiement de mauvaise foi. Par le passé, les employés avaient droit à des dommages-intérêts compensatoires en cas d'absence de préavis raisonnable, mais ils n'obtenaient aucune réparation pour les pertes non pécuniaires (comme la souffrance morale ou l'atteinte à la réputation) découlant d'une conduite de mauvaise foi à moins que cette conduite constituait à elle seule une cause d'action suffisante (par exemple, diffamation).

En dépit de cette « règle », les tribunaux canadiens ont trouvé un certain nombre de moyens

de compenser les employés et/ou de punir les employeurs ayant agi de mauvaise foi, ce qui a entraîné une jurisprudence quelque peu erratique. Dans *Wallace*, la Cour suprême a tenté de s'attaquer à l'incertitude et à l'imprévisibilité du droit et d'établir un équilibre entre la protection des employés contre la conduite de mauvaise foi et le maintien de la liberté des employeurs en matière de gestion de leurs effectifs.

La Cour suprême a confirmé le droit de l'employeur de congédier un employé pour quelque motif que ce soit, pour autant qu'il donne un préavis raisonnable. Elle a toutefois ajouté que l'employeur doit exercer ce droit de congédiement de bonne foi, ce qui signifie qu'il doit agir d'une façon *candide, raisonnable, honnête* et *sincère* et s'abstenir de conduite *injuste, fallacieuse* et *indûment insensible*. La Cour a proposé comme réparation de prolonger la période du préavis raisonnable au-delà du délai qui aurait été imparti n'eût été de la conduite de mauvaise foi.

La juge McLachlin (qui n'était pas encore juge en chef à l'époque), parlant au nom de la minorité dans l'*affaire Wallace*, s'est dite en désaccord avec la réparation proposée par la majorité, préférant traiter l'obligation d'agir de bonne foi à la rupture de la relation employeur-employé comme une condition implicite du contrat de travail dont la contravention pouvait donner naissance à une action en dommages-intérêts et déterminer les dommages à attribuer en fonction de la perte réelle que l'employé a subie en raison de la conduite de l'employeur.

L'obligation d'agir de bonne foi énoncée dans *Wallace* a été bien accueillie. Par contre, la réparation voulant que soit prolongée la période du préavis a fait l'objet de critiques pour bien des motifs. La raison d'être du *préavis raisonnable* est de donner à l'employé congédié un soutien financier pendant qu'il cherche un nouvel emploi. La longueur du préavis dépend de facteurs ayant trait à la capacité de l'employé de trouver un nouvel emploi et a très peu à avoir avec la perte attribuable à la conduite de mauvaise foi.

Comme la réparation ne vise pas l'envergure de la perte réelle qu'a subie l'employé, elle risque d'être insuffisante ou trop généreuse. Le revenu mensuel de l'employé n'est pas un facteur approprié dont il faut tenir compte pour compenser un renvoi de mauvaise foi car ni la perte qu'a subie l'employé ni la nécessité de dissuasion n'ont trait au niveau de revenu. Qui plus est, les gagne-gros recevraient plus que les gagne-petit, que leur perte aient été plus grande ou non.

C. SOLUTIONS DE RÉFORME ET RECOMMANDATIONS

La Commission reconnaît comme principe de départ que les relations de travail jouent un rôle vital pour la santé et le bien-être des employés, des employeurs et de la société dans son ensemble. Elle reconnaît que les employeurs ont besoin d'une certaine liberté en matière de gestion de leurs effectifs s'ils veulent être concurrentiels, mais elle reconnaît aussi la présence d'un déséquilibre des pouvoirs en faveur des employeurs et le fait que leur conduite de mauvaise foi, le cas échéant, peut avoir des conséquences négatives graves pour les employés.

Les dix recommandations que contient le rapport se fondent sur la croyance de la Commission voulant que le droit reflète les normes de conduite d'employeurs responsables, raisonnables et justes ainsi que les attentes raisonnables d'employés honnêtes.

Pour en arriver à ces recommandations, la Commission a tenu compte du pouvoir que détenaient les employeurs de congédier des employés sans motif valable ainsi que de leur conduite dans l'exécution et la résiliation des contrats de travail.

Le fait de restreindre ou d'éliminer le droit des employeurs de congédier pour quelque motif que ce soit accroîtrait la protection des droits des employés, mais porterait considérablement atteinte à la capacité des employeurs de gérer leurs effectifs et à leur capacité d'être concurrentiels dans une économie mondiale. La Commission ne disposait pas de renseignements suffisants ni d'analyses d'expert pour déterminer les conséquences d'un changement aussi radical dans le droit. Par conséquent, elle ne recommande pas de changement dans le pouvoir traditionnel dont disposent les employeurs en vertu de contrats de travail de durée indéterminée de congédier des employés pour quelque motif que ce soit, pour autant qu'ils donnent un préavis raisonnable ou qu'ils versent un salaire tenant lieu d'avis et qu'ils agissent de bonne foi dans le processus de rupture de la relation employeur-employé. (Recommandation 1)

Pour déterminer la conduite de l'employeur en ce qui a trait à l'application et à la résiliation du contrat de travail, la Commission préfère la solution que préconise la minorité dans ***Wallace***. En effet, cette dernière considère que l'obligation d'agir de bonne foi dans la résiliation d'un contrat de travail individuel constitue une condition implicite du contrat en question dont la contravention peut donner naissance à une action en dommages-intérêts devant être déterminés en fonction de la perte réelle qu'a subie l'employé.

La Commission pousse l'argument encore plus loin en étendant cette obligation d'agir de bonne foi à l'*application* autant qu'à la *résiliation* du contrat de travail. Les employés sont tout aussi susceptibles d'être victimes de la conduite de mauvaise foi de leur employeur en cours de contrat qu'à la résiliation de ce dernier. Il est possible même que plus de dommages soient causés par une conduite de mauvaise foi en cours de contrat qu'à sa résiliation. Restreindre la portée de cette obligation serait de mauvaise inspiration d'autant plus que la raison d'être de l'obligation est de protéger les employés contre de tels dommages.

Le concept d'une obligation étendue de bonne foi dans le contexte du travail prend de plus en plus d'ampleur, tant en common law (par exemple, le droit du congédiement déguisé) que dans les lois (*Loi sur les relations du travail* et *Code des droits de la personne*). Le concept de la condition implicite de bonne foi dans le contrat de travail est donc compatible avec les textes précités et faciliterait une élaboration rationnelle et cohérente du droit du travail. Il contribue à accroître la certitude et la prévisibilité.

L'obligation d'agir de bonne foi ne gênerait pas outre mesure l'efficacité des employeurs à gérer leurs effectifs et offrirait une protection importante aux employés. Qui plus est, elle

réduirait la disparité dans le traitement des travailleurs syndiqués et des travailleurs non syndiqués qui sont protégés contre la conduite de mauvaise foi par une disposition législative implicite qui se trouve dans chaque convention collective signée au Manitoba.

Pour les raisons susmentionnées, la Commission recommande que les contrats de travail individuels soient subordonnés à une condition implicite obligeant les employeurs à agir de bonne foi tant pour l'application du contrat que pour sa résiliation. (Recommandations 2 et 6)

L'obligation d'agir de bonne foi devrait s'appliquer aussi bien aux contrats de durée indéterminée qu'aux contrats de durée fixe. De plus, la conduite de mauvaise foi ne devrait être permise en aucune circonstance. En conséquence, la Commission recommande que l'obligation d'agir de bonne foi s'applique en dépit de toute convention contraire. Autrement dit, il devrait être interdit aux employeurs et aux employés de se soustraire contractuellement à l'obligation d'agir de bonne foi. (Recommandations 3 et 7)

Dans son étude des réparations pouvant être accordées en cas de non-respect de la condition implicite de bonne foi, la Commission en est arrivée à la conclusion que la réparation, quelle qu'elle soit, devrait tenir compte de la perte intégrale de l'employé, tant pécuniaire que non pécuniaire, et que des dommages-intérêts exemplaires devraient être accordés, particulièrement dans les cas flagrants d'inconduite, et ce, à titre de pénalité et de mesure de dissuasion. En conséquence, la Commission recommande que les réparations pour conduite de mauvaise foi comprennent l'attribution de dommages-intérêts compensatoires et exemplaires. Recommandations 4 et 8)

La Commission s'est aussi penchée sur la question de savoir si l'obligation d'agir de bonne foi devait se rattacher au droit de la responsabilité civile délictuelle ou plutôt au droit des contrats. Le droit de la responsabilité civile délictuelle offre plus de flexibilité pour ce qui est des réparations. Par contre, le contrat de travail relève principalement du domaine des droits et des obligations des employeurs. Il serait donc préférable d'élaborer l'obligation d'agir de bonne foi de sorte qu'elle soit compatible avec d'autres obligations. Par conséquent, la Commission ne recommande pas la création d'un renvoi de mauvaise foi se fondant sur le droit de la responsabilité civile délictuelle. (Recommandation 5) Cette recommandation n'a pas pour effet de limiter les employés à des poursuites pour rupture de contrat. Donc, la Commission recommande que les employés soient autorisés à intenter des poursuites et à demander toutes les réparations auxquelles ils peuvent avoir droit en common law, y compris le droit d'intenter des poursuites pour rupture de contrat, d'intenter des actions en responsabilité civile délictuelle ou de porter plainte devant la Commission des droits de la personne du Manitoba. (Recommandation 9)

La common law change très lentement, et il est peu probable que la Cour suprême revienne de sitôt sur cette question. Par conséquent, la Commission suggère que ses recommandations soient intégrées à une nouvelle loi qui pourrait s'intituler *Loi sur les contrats de travail.* (Recommandation 10)